No. 91-1546-ATX
Status: DECIDED

Docketed:
March 23, 1992

Title: Bob Slagle, Chairman, Texas Democratic Party, Appellant
v.
Louis Terrazas, et al.

Court: United States District Court for the Western District of Texas

Counsel for appellant: Bass,Bob, Allison,James P., Hicks,Renea

Counsel for appellee: McCamish,John N., Goble,Rob, Hicks,Renea

Js mailed March 23; recd March 25, 1992.

Entry	Date	Note	Proceedings and Orders
1	Feb 18 1992	D	Application (A91-599) for a stay pending appeal, submitted to Justice Scalia.
11	Feb 18 1992		Application (A91-599) referred to the Court by Justice Scalia.
3	Feb 19 1992		(A91-599) The application for stay pending appeal, presented to Justice Scalia and by him referred to the Court, is denied. Justice Blackmun and Justice Stevens would grant the application.
12	Feb 19 1992		Application (A91-599) denied by the Court.
4	Mar 23 1992	G	Statement as to jurisdiction filed.
5	Mar 23 1992		Appendix of appellant filed.
6	Apr 24 1992		Brief of appellees Louis Terrazas, et al. in opposition filed.
7	Apr 29 1992		DISTRIBUTED. May 15, 1992
8	May 18 1992	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	Jun 19 1992	D	Motion of appellant for establishment of deadline for submission of the views of the United States filed.
10	Jun 22 1992		DISTRIBUTED. June 26, 1992
13	Jun 23 1992		Letter from state respondents indicating that they do not oppose appellant's motion for a deadline, received.
14	Jun 29 1992		Motion of appellant for establishment of deadline for submission of the views of the United States DENIED.
15	Sep 4 1992		One copy of U.S. District Court documents received.
16	Sep 4 1992		Brief amicus curiae of United States filed.
18	Sep 4 1992		Supplemental brief of appellant Bob Slagle filed.
17	Sep 9 1992		REDISTRIBUTED. September 28, 1992
19	Oct 5 1992		Judgment AFFIRMED. Dissenting opinion by Justice Stevens with whom Justice Blackmun joins. (Detached opinion.)

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91-1546

No. 91-1270

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BOB SLAGLE,
Appellant

vs.

LOUIS TERRAZAS, et.al.
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT FOR APPELLANT BOB SLAGLE

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March, 1992

QUESTIONS PRESENTED

1. Whether a court-imposed interim plan for redistricting state legislative districts which contains a total maximum deviation of 9.98% violates constitutional standards.

2. Whether the following actions of a district judge give rise to an appearance of impropriety sufficient to require reversal, to wit: 1) the judge testified as an expert witness for Plaintiff Terrazas in a previous redistricting case; the Judge's law clerk was previously employed by Plaintiff Craddick, the Judge engaged in material ex parte communications with interested persons; the Judge allowed a personal friend and primary candidate to designate part of the redistricting plan, and the judge has instructed an attorney to appear as his personal counsel at a deposition in this cause.

3. Whether a court-ordered redistricting plan which is based primarily on a proposed plan submitted by a party to the litigation is subject to the preclearance requirement of Section 5 of the Voting Rights Act.

LIST OF PARTIES

Plaintiffs

Louis Terrazas
Ernest Angelo, Jr.
Tom Craddick

Plaintiff-Intervenors

Sim D. Stokes III
Robert A. Estrada
David Sibley
Bill Sims
Eddie Lucio, Jr.

Defendants

Ann Richards, Governor of Texas
Dan Morales, Attorney General of Texas
John Hannah, Jr.,
Secretary of State of Texas
Bob Slagle
Fred Meyer

Intervenors for limited purposes

Sharon Gilbert
Jo Ann Reyes
Royla Cox
Bruce Auld
Fred W. Davis
Jeff Walker
R. E. Thornton
Bob Aikin
Doyle Willis, Jr.

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OPINIONS BELOW

The opinions below are the Summary Opinion and Judgment of December 24, 1991, the Order and Judgment of January 10, 1992, the Amended Order and Judgment of January 13, 1992, the Amended Order and Judgment of January 16, 1992, and the Amended Order and Judgment of January 24, 1992. None is reported. These orders are reproduced in the Appendix to this Jurisdictional statement at pages 1a, 50a, 82a, 86a and _____ respectively.

JURISDICTION

The three-judge court below was convened pursuant to 28 U.S.C.§2284(a). The preliminary injunction orders which Appellant challenges herein were issued on December 24, 1991, and January 10, 1992, as amended on January 13, 16, and 24, 1992.

Appellant filed timely notice of appeal on January 23, 1992. (Appendix p. 90a) Accordingly, this court has jurisdiction of this appeal pursuant to 28 U.S.C. §1253 and 42 U.S.C. §1973(c).

STATUTES INVOLVED

The principal federal statutes involved are Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§1973 and 1973(c). They are reproduced in the Appendix to this Jurisdictional statement at pages 93a and 95a.

STATEMENT OF THE CASE

The statement of the case contained in the State Appellant's Jurisdictional Statement accurately reflects the procedural history of this case. Appellant, therefore, adopts and hereby incorporates that statement of the case as though fully set forth herein. There are,

however, additional matters relevant to the issues raised in this appeal. These are set forth below.

On July 1, 1991, Appellant filed a motion to recuse Judge Nowlin, pointing out that Judge Nowlin had testified on behalf of Plaintiff Terrazas ten years ago in a case involving a Republican challenge to the redistricting plan adopted after the 1980 census (Application for Stay, Appendix C, Attachment E).[1] This motion was denied without a hearing.

On January 23, 1992, Appellant filed his second motion to recuse, re-urging the fact that Judge Nowlin's partisan Republican affiliations, and in particular his previous testimony on behalf of Terrazas, created the

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[1] Because they are voluminous, the documents previously provided to the Court in Appellant's Application for Stay will not be attached to the Jurisdictional Statement

appearance of partiality by Judge Nowlin. The motion further asserted that George Pierce, a Republican Primary candidate in Senate District 26, had assisted the court in drawing the court-ordered interim plan, and that this gave rise to an appearance of impropriety sufficient to require recusal. (Application for Stay, Appendix C, Attachment E). On February 5, 1992, this motion was summarily denied without a hearing.

On February 7, 1992, Appellant filed a motion asking the full three-judge court to review Judge Nowlin's failure to recuse (Application for Stay, Appendix C, Attachment F). A hearing was requested. Rather than submit the motion to the full court, Judge Nowlin denied the motion without a hearing.

As evidence began to mount regarding the extent and materiality of ex parte communications between

court personnel and Republican partisans, the State Appellants noticed the depositions of Judge Nowlin's law clerks. By his order of February 10, 1992, Judge Sam Sparks refused to allow any questioning of the law clerks, finding, in essence, that ex parte communications are privileged.

While both Appellant and the State have been frustrated in their attempts to gather evidence relevant to the recusal issue, it is apparent that the deliberative process by the panel below has been tainted by outside influence. New evidence continues to surface, and it has been sufficiently compelling to persuade the Judicial Council of the Court of Appeals to order a panel of judges to conduct an exhaustive investigation into these matters. This investigation is ongoing.

On February 14, 1992, Appellant filed his motion to vacate the substantive orders entered in this case to date, and requested a hearing on the motion (Application for Stay, Appendix C). There has been no hearing, and no ruling on the motion.

On February 17, 1992, Appellant filed with this Court his Emergency Application for Stay pending appeal, asking this court to stay the Texas Senate primary election. The application was denied by order of February 19, 1992. Justices Stevens and Blackmun would have granted the stay.

THE QUESTIONS ARE SUBSTANTIAL

This Court has repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination." E.g. Reynolds v. Sims, 377 U.S. 533, 586 (1964). The Court

has acknowledged that exceptional circumstances may require a federal court to intrude on the process. In these circumstances however,

> the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination.

Connor v. Finch, 431 U.S. 407, 415 (1977). The court below has ignored this admonition with respect to both the substance of its plan and the process by which it was devised.

The result is that the entire state of Texas, with a population of 16,986,510 persons, is forced to proceed with State Senate elections under a federal court-ordered plan which is constitutionally infirm on its face, which fails to comply with the Voting Rights Act, and which is

wholly tainted by both the partisan bias of Judge Nowlin and the extensive, material ex parte communications.

The questions presented are not only important for the people of Texas, however. The conduct of Judge Nowlin has received widespread notoriety, and has undermined confidence in the federal judicial system.

Moreover, the district court's unjustified usurpation of the state's right to reapportion itself, whether motivated by bias or not, destroys the finely crafted balance of federal-state relations fashioned by this Court over a period of decades. It is imperative that this Court act now to re-adjust this balance, to resurrect the integrity of the federal judiciary and to protect the constitutional and statutory rights of almost seventeen million Texans.

I.
THE COURT-ORDERED PLAN FAILS TO SATISFY CONSTITUTIONAL ONE PERSON-ONE VOTE STANDARDS

The court-imposed Senate plan, adopted in a split decision of the three judge panel, contains a maximum population deviation of 9.98% between Senate District 22 and Senate District 25. (Application for Stay, Appendix C, Attachment A). This far exceeds the constitutional standard for a court-imposed plan. Therefore, the plan is constitutionally infirm and the orders requiring its implementation must be vacated.

The relevant standard was declared by this Court in Chapman v. Meier, 470 U.S. 1 (1974):

> [A] court-ordered reapportionment plan of a state legislature...must ordinarily achieve the goal of population equality with little more than de minimis variation. Where important and significant state considerations rationally mandate

> departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

Id at 26-27. See also Connor v. Finch, 431 U.S. at 418.

In Wyche v. Madison Parish Policy Jury, 635 F.2d 1151 (5th Cir. 1981), the Fifth Circuit applied the Chapman - Connor standard to a court-imposed plan. After noting the de minimis standard, the court held that the deviation embraced by the plan, 8.2%, was "far more than de minimis." Id. at 1159. Therefore, the plan was deemed unconstitutional.

As noted above, if the court below was unable to devise a plan with de minimis deviation, it was required to explain precisely why the deviation was unavoidable. Chapman 427 U.S. at 27. Moreover, this Court has

strongly intimated that the explanation must be grounded on state policy considerations. Id.; See also Swann v. Adams, 385 U.S. 440, 444 (1967).

In the present case, the court imposed plan, with a deviation of 9.98%, fails to meet constitutional standards. Moreover, the three-judge court failed to articulate a single reason to justify its failure to fashion a constitutional plan with reference to state policy considerations. Therefore, the orders calling for implementation of this plan must be vacated.

In the court below, Plaintiffs have cited Watkins v. Mabus, 771 F.Supp. 789 (S.D. Miss. 1991), aff'd. __U.S.__, 112 S.Ct. 412 (1992), for the proposition that the fact that the court imposed plan is an interim plan renders constitutional requirements inapplicable. Plaintiffs have misconstrued the holding in Watkins, and

their reliance on it is misplaced. The critical difference between Watkins and the present case is that the plan in Watkins was not a a plan drawn and imposed by the court. Therefore, in Watkins, the de minimus standard did not apply. In the present case the plan is a court plan, and is subject to the de minimus standard.

In Watkins, the district court found that it had insufficient time to hear evidence, and insufficient time to prepare a plan. Moreover, the court's review of plans proposed by the parties revealed that none were acceptable. Given this state of affairs, the district court deemed it appropriate to allow the impending elections to proceed under the pre-existing legislatively drawn lines, even though the lines were ten years old, and thus failed to satisfy either constitutional or Voting Rights Act standards. Thus the court properly deferred to the

state's legislative choices, albeit the ones made ten years ago.

Thus, contrary to Appellees' representations, Watkins does not stand for the proposition that the mere fact that the court's plan is presently termed an "interim plan" prohibits the application of constitutional principles. It is true that this Court has upheld interim plans which failed to satisfy constitutional or statutory standards in situations in which the court had no time to prepare a valid plan. In the present case, however, the court did have the time to fashion a plan. The court conducted a full-scale evidentiary hearing lasting four days. Numerous exhibits were introduced, and extensive expert testimony was given. After the hearing, the court spent several days working on its plan. When its plan was issued, the court represented that it was a superior

plan which should supplant the plan of the Texas Legislature. Clearly, this is not a situation in which the court acknowledged that a lack of time prevented the development of a plan which satisfied legal standards.

Finally, the court in Watkins did acknowledge the deficiency in its plan, and justified it with reference to specific state policy interests. In the present case, the district court failed to acknowledge the constitutional deficiency embraced by its plan, and wholly failed to justify the unacceptable deviation with reference to legitimate state concerns. The belated attempts of counsel to justify the plan do not rehabilitate the court's failure to do so. This plan fails to satisfy constitutional standards, the failure is not justified and the orders and judgments calling for its implementation must be reversed.

II.

THE CONDUCT OF JUDGE NOWLIN GIVES RISE TO AN APPEARANCE OF IMPROPRIETY WHICH IS SUFFICIENT TO REQUIRE THAT THE SUBSTANTIVE ORDERS OF THE COURT BELOW BE VACATED

Questions of disqualification must be viewed under an objective standard. That is, disqualification is required if a reasonable man who was aware of all of the relevant circumstances would harbor doubts about a judge's impartiality. E.g. Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) aff'd _____ U.S. ____, 108 S.Ct. 2194 (1988). See also Code of Judicial Conduct, Canon 3(c)(1). This is true even if the judge is, in fact, impartial. Liljeberg, 796 F.2d at 802; Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983). As outlined below, the evidence of judicial impropriety in this case is overwhelming,

uncontroverted and clearly sufficient to cause a reasonable man to doubt Judge Nowlin's impartiality.

In his order of January 27, 1992, unsealing the court's computer files previously closed from public scrutiny, Judge Nowlin stated that "no representative or employee of this Court has accessed them (the Legislative Council's computer files) since December 24, 1991, nor has the Court given authorization for such access at any time other than to designated employees of the Court."

On February 3, 1992, George Pierce, Republican primary candidate in Senate District 26, clearly contradicted Judge Nowlin's assertion by testifying that Judge Nowlin personally requested Pierce's assistance in preparing the plan, and that Pierce used the computers of the Texas Legislative Council to accomplish his

changes. (Application for Stay, Appendix C, Attachment B). Pierce admitted that he communicated with both Judge Nowlin and his law clerks regarding the subject matter of this lawsuit (Id.) Pierce also acknowledged that he is a close, 25-year friend of Judge Nowlin (Id.) In his deposition testimony in the original Terrazas case, Judge Nowlin described himself as a political consultant to George Pierce (Id. Attachment C, pp 243-44).

The phone records of Pierce's state office reflect that, between December 16 and December 24, 1991, twenty-three phone calls were made from Pierce's office to either Judge Nowlin's home or his office. Twelve of these calls were made on December 23 or 24, 1991, in the critical twenty-four hour period prior to the issuance of the court's Summary Opinion and Judgment of December 24, 1991. (Id., Attachment D) Additional

calls were made from Pierce's office to Mr. Jim Duncan, political director of the Republican Party and the law offices of John McCamish, counsel for both the Terrazas Plaintiffs and various Republican Party Affiliates (Id.)

Pierce maintained at his deposition that his ex parte involvement was solely to correct data errors and the identify the boundaries of municipalities. However, this assertion has been flatly refuted by the statements of Legislative Council personnel. There were no errors in the data, and the boundaries of the municipalities in question, Alamo Heights and Terrell Hills, were clearly established on the computer and well known to all involved (Id. Attachment E, Affidavit of Tina M. Hengst; Attachment F, Affidavit of Bryan Murdock). Moreover, the computer records establish that the changes made by Pierce were detrimental to Pierce's

primary opponents (Id. Attachment G, Affidavit of Chris Sharman).

In the court below, the Republican Plaintiffs have attempted to counter this evidence by asserting that the court was working on two plans, and that the plan Pierce worked on was not the plan that ultimately became the court-ordered plan. This distinction does not benefit Plaintiffs; nor does it cure the clear impropriety of Judge Nowlin's actions. First, the issue of whether the impropriety actually affected the disposition of the case is irrelevant to the question of whether recusal is required. Second, Plaintiff's argument ignores the fact that changes can be transferred from one plan to another on the computer with a single entry. Indeed, the investigative report prepared by the Attorney General of Texas and forwarded to the investigative committee of

the Fifth Circuit Judicial Council establishes that the substantive changes made by Pierce were later incorporated in large part into the court-imposed plan.

Even if the communications with Mr. Pierce had been simply the result of the court's good faith efforts to obtain technical advice, the communications were nevertheless improper. If the court required assistance, it had a duty to "give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond." Code of Judicial Conduct, Canon 3(B)(7)(b). In the present case, the court neither notified the parties nor sought their input regarding the extensive and material ex parte communications with Pierce. Other evidence indicates that Alan Schoolcraft, a primary opponent of Pierce, also communicated with the court.

Moreover, other evidence indicates that the ex parte communications may extend beyond Pierce to include actual parties to the litigation. The deposition testimony of Senator Bob Glasgow indicates that Republican Senator David Sibley, a party to this action, also obtained knowledge of the content of the court-ordered plan prior to its issuance through ex parte communications (Id. Attachment H, Excerpts from the Deposition of Senator Glasgow)

Recently, Appellant has learned that one of Judge Nowlin's law clerks, J. D Munn, was previously employed by Tom Craddick, one of the Republican Plaintiffs in the court below. The relationship between Munn and Plaintiff Craddick was not previously disclosed and Mr. Munn performed substantial work on the Court plan. The existence of the relationship serves

to substantially increase the already imposing appearance of impropriety.

Finally, Judge Nowlin has retained Roy Minton, a prominent local attorney, to represent his interests in the case below. On February 24, 1992, Mr. Minton appeared on behalf of Judge Nowlin at the deposition of Carl Stringfellow (Appendix p. 101a). This deposition was taken by the Plaintiffs as discovery in this cause. Judge Nowlin's reasons for requiring personal counsel to the court to appear at a deposition in a cause pending before him were not disclosed. If Judge Nowlin had merely a judicial interest in this deposition, it would have been appropriate to appoint a special master to attend. Instead, Judge Nowlin retained private counsel and instructed him to appear at the deposition. A reasonable

person aware of that fact would have to conclude that the judge has a personal interest in the litigation.

Despite the overwhelming nature of the evidence outlined above, Judge Nowlin has repeatedly refused to grant Motions to Recuse. To protect both the parties and the integrity of the federal judicial system, the only appropriate remedy in this situation is to vacate the judgment entered by the court. Lilgeberg at 803, Hall at 180.

This Court affirmed the Fifth Circuit's decision to vacate the judgment in Lilgeberg. Lilgeberg v. Health Services Acquisition Corp. _____ U.S._____, 108 S.Ct. 2194 (1988). In so doing, the Court observed that three factors should be assessed in determining whether an order or judgment should be vacated: 1) the risk of injustice to the parties in the case; 2) the risk that denial

of relief will produce injustice in other cases; and 3) the risk of undermining the public's confidence in the judicial process. Id. at 2204.

As in Lilgeberg, the application of these factors to the facts of the present case requires that the substantive orders and judgments of the court below be vacated. Specifically, the risk of injustice, both in this and other cases, is greater if the orders are not vacated. All of the parties, and the people of Texas, are entitled to conduct and participate in elections free from the taint of partisan bias and ex parte communications. If the orders are vacated, it cannot be said that this court implicitly approved the actions of the court below, and federal judges will be discouraged such improper action in the future. Finally, regarding the third factor, the actions of the court below, and the attendant notoriety, have

greatly eroded the public's confidence in the federal judiciary much more than the misconduct in Liljeberg. Only this Court can restore public confidence, and this can only be accomplished by taking a firm stand against the actions of Judge Nowlin by vacating the orders and judgments of the court below.

Notwithstanding the fact that Judge Nowlin was only a member of a three-judge panel, he was the deciding vote in a 2-1 decision. It is necessary to vacate the orders in question. This Court has held that when a disqualified judge casts the deciding vote in a case, the only remedy is to vacate the order resulting from the invalid, decisive vote. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-28 (1986) Lavoie was the first opportunity for the Court to address the question of whether a decision of a multimember tribunal must be

vacated due to the invalid participation of one member who should have been disqualified. The Court held that, at a minimum, the underlying judgment had to be vacated when the disqualified member cast a decisive vote. Here Judge Nowlin's vote was both invalid and decisive. Thus, the underlying preliminary injunction must be vacated. See Bradshaw v. McCotter, 796 F.2d 100 (5th Cir. 1986) (applying Lavoie).

III.
THE COURT-ORDERED PLAN MAY NOT BE IMPLEMENTED PRIOR TO PRECLEARANCE

A review of the court-ordered plan reflects that it is, essentially, the FAIR plan submitted by Plaintiff-Intervenors. (Application for Stay, Appendix, Attachment G) The fact that this court has adopted this

plan does not make it a "court-drawn" plan which is not subject the terms of Section 5 of the Voting Rights Act.

In McDaniel v. Sanchez, 452 U.S. 130 (1981), this Court addressed the scope of the preclearance requirement of Section 5. In analyzing the issue, the Court quoted with approval and relied upon the following language from the Senate Committee on the Judiciary's Report regarding the 1975 amendment to the Voting Rights Act.

> "Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its

consideration of--or selection among--any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

"The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant

...Senate Report at 18-19.

McDaniel v. Sanchez, at 148-49. In the present case, the evidence establishes that the court in this case relied heavily on the FAIR plan rather than fashioning its own plan. Therefore, the plan must be precleared prior to implementation.

Of course, by its terms, Section 5 applies only to political subdivisions. The term "political subdivisions",

however, is broadly defined to include "all entities having power over any aspect of the electoral process". United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 118 (1978). Political parties and their various committees fall within the scope of Section 5. E.g. Fortune v. Kings County Democratic County Committee, 598 F.Supp. 761 (E.D.N.Y. 1984). Therefore, the FAIR Republican plan is subject to Section 5, and the court below lacked authority to order implementation of the substantially similar court plan prior to preclearance. The orders requiring implementation should be vacated, or suspended, pending preclearance of the court-ordered plan.

The above arguments aside, the fact that the court-ordered plan is essentially the FAIR plan illustrates that the court exceeded its authority in this

case. When a district court finds a Section 2 violation, and finds it necessary to adopt or fashion a plan to cure the violation, it "should not pre-empt the legislative task nor intrude upon state policy any more than necessary." White v. Weiser, 412 U.S. 783, 794 (1973) (district court erred when, in choosing between two possible plans, it failed to choose plan which most closely approximated state-proposed plan). Moreover, in Upham v. Seaman, 456 U.S. 37, 40-41 (1981) the Court held that a given legislative district should not be changed by a court plan absent a specific finding of a constitutional or statutory violation with respect to that district.

In the present case, in reviewing Senate Bill 31, the court found that proposed District 15 diluted minority voting strength and that "Districts 19 and 26 as drawn in SB 31 likely fail to meet the requirements of

Section 2." (Summary Opinion and Judgment, December 24, 1991) (Emphasis added). Thus, the court found only one violation and two likely violations. Nevertheless, the court ordered implementation of a plan in which "fully half of the Senate Districts...are substantially the same as under SB 31." (Id.) In other words, the court changed half of the 31 districts provided for in SB 31 and left the other half substantially intact, but not untouched. Given that a Voting Rights violation was found in only one district, the court below clearly exceed its authority under Upham.

Finally, the court below noted in its judgment of December 24, 1991 that any "partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the court's emphasis on the interests of long-neglected minority concerns." A

comparison of the court-ordered plan with both SB 31 and the FAIR plan, however, reveals the true explanation for the sweeping changes made to the plan of the Texas Legislature. The court-ordered plan actually dilutes minority participation while seeking to achieve a partisan purpose.

By basing the court-ordered on the FAIR plan, the court exceeded its authority under Upham and has ordered implementation of the plan of a party which has not been precleared as required by Section 5. Therefore, the orders of December 24, 1991, and January 10, 1992, as amended, must be vacated.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the three-judge court's judgments and orders of December 24, 1991, and January 10, 1991, as

amended, to the extent they require elections to proceed under the court-ordered Senate redistricting plan.

91-1546

(2)

No. 91-1270

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BOB SLAGLE,
Appellant

vs.

LOUIS TERRAZAS, et.al.
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

APPENDIX TO
JURISDICTIONAL STATEMENT FOR
APPELLANT BOB SLAGLE

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March, 1992

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed December 24, 1991 at 2:43 p.m.

LOUIS TERRAZAS, et.al.	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et.al.	§	CIVIL NO. A-91-CA-428

SUMMARY OPINION AND JUDGMENT

Before the Court is plaintiffs' motion for implementation of interim plan flied in cause number A-91-CA-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in cause number A-91-CA-426 on November 27, 1991; Intervenor Simms and Lucio's request for implementation of interim plan filed in cause number A-91-CA-426 November 27, 1991; Intervenor Sibley's request for interim relief filed in cause

number A-91-CA-426 November 27, 1991; and plaintiffs' request for implementation of interim plan and consolidated hearing filed in cause number A-91-CA-428 on November 27, 1991. On December 10, 1991 this Court began a nearly four-day hearing on these various motions at which time the argument of counsel, testimony of witness, and other evidence was offered into the record. Upon review of the motions, the responses filed, the file of this case, and the evidence and argument presented at the hearing the Court is of the following opinion.

I. BACKGROUND

Rarely has the procedural background of a case been more convoluted or important that in the instant causes dealing with redistricting in Texas following the 1990 Decennial Census. On February 7, 1991 various

individual Hispanic voters (Mena plaintiffs) filed suit in Hidalgo County District Court, 332nd Judicial District of Texas, challenging the figures published in the 1990 Decennial Census on the grounds that said figures grossly under-represented the number of Mexican-Americans and African-Americans in Texas. This census undercount, the argument continued, could potentially operate to deprive these minority groups of their voting rights under article I, sections 3, 3a, 19 and 29 of the Texas Constitution. A census undercount case was also filed by the Mena plaintiffs in the United States District Court for the Southern District of Texas, later amended to include redistricting challenges. No significant action has taken place in the Southern District case, nor was a three-judge panel ever impaneled there. While the state lawsuit was underway, the Legislature reapportioned

state senatorial and representative districts using the 1990 census without adjusting for any undercount. The Legislature later reapportioned congressional districts in House Bill 1 ("HB "1) also using unadjusted census figures. All three plans were submitted to the Justice Department for preclearance as required by Sec. 5 of the Voting Rights Act.

Meanwhile, on May 23, 1991 plaintiffs Terrazas, Angelo, and Craddic ("Republican plaintiffs") filed three separate lawsuits invoking this Court's jurisdiction under the Voting Rights Act and Fourteenth and Fifteenth Amendments challenging the reapportionment scheme adopted by the State Legislature for the Texas House of Representatives, Texas Senate, and United States Congress in cause numbers 425, 426, and 428 respectively. A three-judge panel was convened in these

cases on June 24, 1991. After the Republican plaintiffs filed their instant lawsuits, the Mena plaintiffs amended their state pleadings to challenge the validity of House Bill 150 ("HB 150"), (House), and Senate Bill 31 ("SB 31"), (Senate), to require that legislative districts be redrawn using adjusted population figures. The same various state officials (the "state defendants"), among others, were named as defendants in both state and federal cases. There were now both state and federal lawsuits running parallel attacks on the 1990 redistricting statutes passed by the Texas Legislature. As evidenced by the record in this case, these "parallel" suits would cross, intertwine, and tangle to the point that the next round of primary elections in Texas may not occur as scheduled without action by this Court.

It was the state case that first caused this Court to review the substance of the Republican plaintiffs' complaints. On July 29, 1991 the State Defendants filed a motion to stay state court proceedings, requesting this Court stay the Hidalgo County proceedings, arguing that a state court order requiring the State of Texas to use population number other than those reported in the 1990 Decennial Census could place the state defendants in the quandary of having to comply with a state court order that could eventually be found in contravention of federal constitutional principles by this Court. In the interest of avoiding such a state and federal constitutional conflict, the argument continued, a stay of state proceedings was warranted. Finding the defendants' posture did not entitle them to injunctive relief, this Court denied the motion by Order entered

August 2, 1991. On August 5, 1991, the state court commenced hearing on the Mena plaintiffs' application for temporary injunction and partial summary judgment, with the state defendants, represented by the Attorney General, defending the validity of the reapportionment statutes passes by the Legislature.

On August 22, 1991 the state court granted plaintiffs' requested relief, declared the 1990 Decennial Census undercounted minority populations in Texas, and ordered the state to submit new plans using adjusted figures by September 30, 1991. The state promptly filed an appeal with the Texas Supreme Court, requesting a stay of the trial court proceedings pending the appeal. The Supreme Court granted the stay on September 24, 1991.

While the Attorney General had filed an appeal, he was actively working with the Mena plaintiffs in an attempt to resolve their differences with respect to the Texas Senate. By October 7, 1991, nineteen of the state's thirty one senators unofficially approved an agreement settling the dispute with the Mena plaintiffs regarding the Texas Senate. Because the stay of the Mena proceedings remained in effect, plaintiffs filed a new lawsuit in Hidalgo County styled Quiroz v. Richards, and entered an agreed judgment in that case memorializing the senate settlement - all on the 7th of October 1991. Part of that Judgment ordered that elections for the state Senate be held under the alternate districting plan agreed to by the parties in Quiroz. As a result, the Texas Secretary of State notified the Department of Justice ("DOJ") that SB 31, even though

it had been passed by both houses of the State Legislature, would be withdrawn from consideration for preclearance, and that the Quiroz Senate plan would be promptly substituted in its place. SB 31 had been before the DOJ for 59 days when the Secretary of State removed it from consideration.[1] The DOJ granted preclearance approval of the Quiroz plan was now the law under which elections would take place for the Texas Senate.

As the procedural shenanigans continued to unfold in the state proceedings, this Court issued various scheduling orders commanding the parties in the instant causes to submit briefs and proposed interim plans for review in the event preclearance would not be obtained

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1 Sec. 1973c requires the DOJ to grant preclearance or issue its objections within 60 days of submission of the proposed voting change.

in time for the 1992 primary elections to proceed. On October 9, 1991 the Republican plaintiffs requested a temporary restraining order with this Court seeking to enjoin the State from substituting the Quiroz plan with the DOJ in place of SB 31, and further enjoin the state defendants from engaging in similar settlement activities that could result in HB 150 being replaced by another agreed plan.[2] A hearing on this motion was held October 23, 1991, and is maintained under advisement to date. The Republican plaintiffs also challenged the Quiroz plan in a mandamus action before the Texas Supreme Court. Though Republican plaintiffs had never intervened in either of the state cases, the Texas Supreme

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2 The state parties that since reached a similar agreement with the Texas House plan, and have submitted their alternative plan to the DOJ for review. The DOJ had lodged objections to HB 150 by letter dated November 12, 1991, finding the plan passed by the Legislature diluted minority voting strength in several specific purported to address concerns voiced by the DOJ.

Court fond they had standing to challenge the activities of the Attorney General and the rulings of the trial judge, and conditionally granted the writ in a plurality opinion delivered December 17, 1991. Finding the Attorney General did not exceed his authority in negotiating the Quiroz and Mena settlements, the Court did find that it was an abuse of the trial judge's discretion to accept the Quiroz plan without any adversary proceeding given the tremendous public impact of such of a judgment. The effect of this opinion was to void the Quiroz plan, place the Mena settlement for the House into question, and return the case to the trial court for a full hearing before entry of judgment.

This panel did not have the benefit of the views of the Texas Supreme Court when the parties in the instant cause came before it for hearing on what interim

relief, if any, should be fashioned to ensure the 1992 primary elections proceed as scheduled under plans that pass muster under the Voting Rights Act and the U. S. Constitution. As it stands at the time of this Opinion, there are no legal plans reapportioning seats for election to the Texas House or Senate that have been precleared by the DOJ. Only HB 1, the plan passed by the Legislature in special session reapportioning seats to the United States Congress, has received preclearance not been successfully challenged under state law. On December 20, 1991, the DOJ filed with this Court notice that it reserved formal comment on its views regarding SB 31 or whether the Mena settlement addressed its concerns with HB 150 until an unspecified date. Accordingly, this Court has reviewed HB 150, SB 31, and HB 1 in light of the Republican plaintiffs' claims,

the concerns of parties amicus and Intervenors, the DOJ's objections to HB 150, and the requirements of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the U.S. Constitution.

II. FEDERAL STANDARDS FOR REDISTRICTING

Title 42 United States Code Sections 1973, et.seq., were originally enacted by Congress in the Voting Rights Act in 1965. An attempt to increase the protection afforded minority voters under the Fourteenth and Fifteenth Amendments, the Act was further strengthened by amendment of Sec. 1973 ("Sec. 2") in 1982 by establishing a totality of the circumstances effects test for minority vote dilution. This forgiving standard alleviates a plaintiff's burden of proving discriminatory intent as traditionally required to prove a violation of the Fourteenth and Fifteenth Amendments. See City of

Mobile, Alabama v. Bolden, 446 U.S. 53, 70 (1980).

Section 1973 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or incontravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section. (emphasis added)
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class been elected to office in the State or political subdivision is one circumstance which may be considered: Provided. That nothing in this section establishes a right to have members of

> a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. Sec. 1973 (West Supp. 1991).

This standard does not require that minority candidates be elected to public office in numbers equal to their percentage of voting age population. Rather, upon review of the totality of the circumstances, a plan redistricting legislative seats fails to satisfy the requirements to Sec. 2 if it: (1) dilutes the voting strength of a minority group populous and concentrated enough to constitute a voting majority in a single district by frustrating the electoral choices of the minority group due to the bloc voting of other voters in the district; or (2) the number of districts in which minority candidates may be successfully elected are reduced due to disproportionally "packing" that minority group into

select districts. See Thornburg v. Gingles, 478 U.S. 30 (1986). Though Gingles dealt with vote dilution in the context of multimember districts, courts in this Circuit have adopted the use of its test in single-member district litigation. See e.g., Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989); Ewing v. Monroe County, Mississippi, 740 F. Supp. 417 (N.D. Miss. 1990). In Brewer, the Circuit held the standard in Gingles is essentially a threshold a plaintiff must cross before the Court reviews the propriety of a given plan under the totality of the circumstances test. Brewer, 876 F.2d at 450. Gingles also served to narrow the Court's review of the circumstances to focus on the extent minority groups have been able to elect candidates of their choice, and the extent to which voting is polarized. Gingles, 478 U.S. at 48, n. 15. There is ample evidence in the record,

including the concession of counsel for the State that there is a strong history of polarized voting in Texas.

Plaintiffs have also alleged all three reapportionment plans passed by the Texas Legislature are replete with partisan gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Intervenor Sibley makes similar assertions, focusing particularly on one Senate district. n 1986, the United States Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986), held that partisan gerrymandering claims are justiciable, though if offered little hope that political plaintiffs might prevail on such claims. Under Bandemer, a plaintiff challenging a plan must show; the plan intentionally discriminates against a political group; the plan will have a long term disproportionate effect on that group's election of representatives; and the effect of

the redistricting scheme as a whole consistently shuts out that group from the political process in that state. Id. at 141-143. This Court's analysis of the evolving law in this area falls outside the scope of this opinion, and the evidence before it at the present time. The parties may have ample opportunity to make a more complete record during the trial on the merits, which the Court presumes will not take place until after the 1992 elections.

A brief recitation of the responsibilities of the DOJ is also in order at this point. Since 1975, Texas has fallen within the scope of Section 5 of the Voting Rights Act which requires that any changes in voting law in a covered state be precleared by the DOJ before they may be implemented. 42 U.S.C. Sec. 1973c (West 1981). A Sec. 5 review is primarily concerned with whether the proposed change causes a retrogression in minority

voting strength, though DOJ guidelines currently require the plan to be scrutinized for noncompliance with Sec. 2 before preclearance may be obtained. See City of Lockhart v. United States, 460 U.S. 125, 133-134 (1983); Beer v. United States, 425 U.S. 130, 139-141 (1976); and 28 C.F.R. Sec. 51.54(a) (1991); 28 C.F.R. Sec. 51.55(b)(1991). The State also bears the burden of showing that the proposed voting change was not enacted with a discriminatory purpose. 28 C.F.R. Sec. 51.52 (1991).

Preclearance of a proposed plan does not bar a subsequent court proceeding brought under Sec. 2. 42 U.S.C. Sec. 1973c. Should this Court find that any of the plans fail to satisfy the federal requirements, it is within the ambit of this panel's discretion to draw remedial plans that may not otherwise comply strictly

with the requirements for fashioning permanent remedies in order to ensure that elections proceed as scheduled. See Upham v. Seamon, 456 U.S. 37, 44 (1982).; Burns v. Richardson, 384 U.S. 73, 85-85 (1966). Any plan drawn by this Court is also exempt from the preclearance requirements of Sec. 5. Connor v. Johnson, 402 U.S. 690, 691-692 (1971).

III. REVIEW OF THE 1990 REAPPORTIONMENT PLANS

A. United States Congress

Republican plaintiffs challenge the following congressional districts drawn in HB 1: Districts 1, 2, 4, 5, 6, 8, 9, 13, 14, 17, 19, 21, 22, 23, 24, 28, 29, and 30. None of these districts generated an objection from the DOJ, and the plan received preclearance on November 18, 1991. Plaintiff's Exhibit 76. With regard to districts

1, 2, 4, 5, and 8, Republican plaintiffs assert that minority communities were split to protect Anglo Democrat incumbents. Upon review of the population data for the counties that comprise these districts, and comparison of the population analysis reports ("PAR Reports") for HB 1 and the Republican proposed plans, this Court finds there are not a sufficient number of minorities in the counties comprising these districts to enable minorities to elect a candidate of their choice, that HB 1 does not regress the number of minorities in the districts as drawn, and that the Republican plan actually has fewer minorities in their proposed districts resulting in an average Anglo voting age percentage of 81.48% compared with an average of 80.36% in HB 1. See Plaintiff's Exhibits 77a - g, and Exhibits 85a - g. Similar claims were lodged against districts 13, 17, 19, 21, 23,

and 28, though in this instance the Republican plaintiffs argued the districts as drawn in HB 1 were drawn as the result of political gerrymandering. This Court finds the plaintiffs have offered no sufficient evidence in support of their political gerrymandering argument pertaining to these districts, and that they likewise contain an insufficient number of minority residents to support a finding that the districts as drawn dilute minority voting strength.

As for districts 6, 9, 14, 22, 24, 29, the Republican plaintiffs allege that districts 25 and 8 are regressed at the expense of creating district 29 as a Hispanic district, and that the other districts were drawn to dilute Republican voting strength. Again, the plaintiffs have offered little evidence in support of their political gerrymandering claims. A comparison of the minority

voting age populations of districts 25 and 8 also reveals that the number of minorities residing in the counties comprising each district is insufficient to elect a candidate of their choice, and that the number of minorities placed in those districts under HB 1 does not serve to dilute the minority voting strength in adjacent minority majority district 18 (Black) and 20 (Hispanic). District 20 is a new Hispanic congressional seat in Harris County. The percentage of minority voting age populations for the plaintiffs' proposed versions of the two minority seats in Harris County are within a percentage point of those in HB 1. See Court's Exhibit 1; Plaintiff's Exhibits 77a - g, and Exhibits 85a - g.

Plaintiffs' remaining challenges to HB 1 involve a minority district encompassing the Dallas metropolitan area. District 30 in Dallas County is a new minority

majority district drawn to elect a Black congressional candidate. While the 61.5% Black and Hispanic voting age population ("VAP") is commendable, the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States. Though this Court is concerned with the flagrant abandonment of compactness and preservation of communities of interest in this district, the Court further finds that a primary motive for any gerrymandering was to enhance Black voters' ability to elect a candidate of their choice. The mere fact that the Republican plaintiffs have fashioned a more compact District 30 with identical voting age population percentages, though more aesthetically pleasing, does not give rise to a

finding of a Sec. 2 violation by this Court at this time. This Court further finds that District 30 as drawn in HB 1 does not dilute the minority vote in adjacent districts, including Hispanics, as has been found in the House and Senate plans passed by the Legislature. For the reasons set forth in this section of the opinion, and the fact HB 1 has received preclearance from the DOJ, this Court finds plaintiffs' claims for preliminary relief fail to meet the standard for injunction to issue at this time, and that the 1992 primary elections for U. S. Congress may be conducted pursuant to HB 1.

B. Texas Senate

As discussed supra, there is presently no legally enacted state plan redistricting the Texas Senate that has received preclearance from the DOJ. Accordingly, this Court must scrutinize SB 31 for Sec. 2 and constitutional

deficiencies as alleged in plaintiffs' complaint without the benefit of the DOJ's comments, if any, compiled during its 59 day review of that plan. Most of the issues raised in intervenors' complaints are either rendered moot by the Texas Supreme Court's December 17, 1991 opinion in Quiroz, or are not relevant to this Court's review of SB 31 at this time. This Court specifically finds that the Quiroz settlement plan is not valid under state law, but merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ.

Plaintiffs challenge the validity of Senate districts 1, 2, 3, 4, 9, 12, 15, 17, 19, 23, 26, and 31. With regard to District 15, this Court is persuaded by plaintiffs' claim that SB 31 does not create a credible Hispanic senate district in Harris County, but actually dilutes minority

voting strength by placing 50.8% voting age Hispanics in that district as compared to the district 15 fashioned by this Court with 51.5% Hispanic voters. Plaintiffs argue that minorities which could have been placed in district 15 to make it a stronger minority majority district were splintered into district 11 to protect an Anglo incumbent. This Court's interim plan also increased the Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black and Hispanic VAP in that district by almost 2%. Due to the configuration of Court district 15, the Court's interim plan also increased the Black VAP of District 13 from 50.4 to 57.2%. The combined effect of the Court's interim Districts 15 and 13 significantly increases the voting strength of minorities in Harris County by ensuring that both a Black and Hispanic state senator will probably be elected from

Harris County. This probability was not as great under SB 31.

Turning to North Texas and the Dallas - Fort Worth metropolitan area, plaintiffs challenge districts 2, 9, 12, and 23. Under SB 31, District 12 generally outlines the City of Fort Worth and contains 64.9% anglo VAP, with approximately 18% Black VAP and 15% Hispanic VAP. This district is presently held by an Anglo incumbent. District 23 as drawn by SB 31 is promoted as a strong Black district that outlines the center of Dallas County, with 44.2% Black VAP, and a combined Black and Hispanic VAP of 67.7%. This Court's review of these districts and the voting tabulation district ("VTD's") they are comprised of indicates that District 12 could be drawn as a strong minority impact district without diluting the Black voting

population's chances of electing a state senator in District 23. District 12 as fashioned by this Court takes the Hispanic community concentrated in West Dallas and part of Irving and links it with the Black community in south central Tarrant County. The result is a district with a combined Black and Hispanic VAP of 48.5%. Under the Court's interim District 12, minority groups will have a significantly greater impact than in District 12 as drawn by SB 31. The Court's interim plan also increases the Black VAP in District 23 almost 2% to 45.6%, while the combined minority VAP remains a greater degree of participation in the political process than under SB 31.

In order to ensure that district 23 contained the requisite number of Black VAP, the Court's interim plan takes a number of VTD's from District 2, presently held

by an Anglo incumbent, forcing District 2 to seek population elsewhere in order to keep its deviation at an acceptable level. The configuration of the Court's interim District 12 as a minority impact district also causes District 9 to be redrawn to include some of the population that SB 31 included in District 2 southeast of Dallas. Consequently, the addition of interim District 12 causes districts 1, 2, 3, 8, 9, 22, and 30 to be slightly adjusted. This Court's review of District 9 reveals SB 31 departed radically from the traditional configuration of that district. Because the Court's drawing of District 12 as a minority impact district makes the Legislature's version of District 9 impossible to reasonably approximate, the Court's plan largely restores that district to its traditional counties of composition, and

has done so without unacceptably deviating from ideal population.

Plaintiffs' remaining challenges, and this Court's only other area of concern with SB 31, involve those districts drawn by the Legislature in South Texas and the Rio Grande Valley. All parties conceded at the December 13th hearing that SB 31 was perceived as "dead on arrival" at the Justice Department because the plan failed to crate stronger Hispanic districts in Bexar County, or address the concerns of Hispanic voters in the districts running South to the U.S. -Mexican Border. SB 31 only create four (4) districts in South Texas that would appear to ensure election of a Hispanic candidate in that area. This Court concurs with those concerns, finds SB 31 likely does not comply with the mandate of Sec. 2 and interpretive case law, and has fashioned

interim districts in those areas that afford Hispanics six (6) state Senate seats in South and West Texas. This Court specifically finds that Districts 19 and 26 as drawn in SB 31 likely fails to meet the requirements of Sec. 2. Under the Court's interim plan the Hispanic districts include numbers 19, 20, 21, 24, 27, and 29. These numbers correspond to SB 31's districts 19, 20, 25, 21, 27, and 29 respectively. Under SB 31, District 25 is not a Hispanic district, yet this Court's interim District 21 approximates the same geographical area. The Court was able to craft its District 21 as an Hispanic district by absorbing part of SB 31's District 26, and allowing District 21 to extend further south by redrawing the three (3) districts running through the Rio Grande Valley.

Under SB 31, District 19, the Hispanic district wholly contained in Bexar county, offers 47.6% Hispanic VAP, with only 39.3% registered voters with Spanish surnames. This Court finds that District 19 as drawn in SB 31 likely fails to comply with Sec. 2's requirements that the minority group be able to elect a candidate of its choice, because the percentage of Hispanic voter turn out is too weak. This Court was able to fashion its interim District 19 to provide 56.2% Hispanic VAP, and 48.7% voters registered under a Spanish surname. District 20 in SB 31 boasts a 58.0% Hispanic VAP and accompanying 50.6% voters registered under Spanish surnames. This Court's interim District 20 almost mirrors those numbers, but it is drawn in such a way that District 24 and 21 may be drawn to create one district well above the deficient level provided in SB 31's

District 26, and another district approximating the percentages in SB 31's District 21. For example, interim District 24 under the Court's plan contains 54.2% Hispanic VAP with a 48.0% voters registered under Spanish surnames. SB 31's District 26 contained only 51.4% Hispanic VAP, and a remarkably lower 42.7% voters registered under Spanish Surnames. This Court notes that the overall percentages in its Hispanic districts are slightly stronger than those proposed in the Quiroz settlement plan that received preclearance by the DOJ.

Given the Court's substantial changes to the plans as drawn for South Texas, Dallas, and North Central Texas, unrelated districts are affected. In drawing the remainder of the State to accommodate the specific changes made by the Court plan, every attempt was made to place as many counties in the interim districts

in the same numbered district as they would have been under SB 31. We consider ourselves to have been successful in this attempt, as fully half of the Senate Districts, namely those in West and East Texas, are substantially the same as under SB 31. The Court made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur.

C. Texas House of Representatives

On November 12, 1991 the DOJ issued its objections to HB 150 in a letter transmitted to the Texas Secretary of State. Noting the most significant demographic change in Texas in the past ten years to be the increase in Hispanic population, the DOJ's objections dealt wholly with the dilution of Hispanic voting strength in El Paso, Bexar and Dallas Counties, and

voiced concerns with districts in the Rio Grande Valley and South Texas. Upon review of the letter and the DOJ's findings, this Court finds considerable merit on the specific objections and has attempted to fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged. This was accomplished to a much grater degree than the Court's interim Senate plan because most House districts changed fell within whole counties and did not effect other lines running through the rest of the state. Other than those areas of the state touched by the DOJ's objections, this Court finds plaintiffs challenge to HB 150 fail given the state of the evidence before the Court at the present time.

Though the DOJ's objection to Dallas County is far from clear, this Court's review of Districts 99

through 114 as drawn in H.B. 150 shows that Hispanic voters were fragmented into various districts completely diluting their ability to a elect a candidate of their choice in any district in Dallas County. This Court further finds that the Hispanic population in Dallas County has grown significantly in the past ten years to the degree Hispanics as a voting group are capable to clearly electing a candidate of their choice in a minority majority Hispanic district, and participate significantly in the election of a candidate in an Hispanic impact district. This can be accomplished without diluting the ability of Black voters to elect at least four (4) candidates of their choice in Dallas County. In attempting to fashion such districts, this Court found its efforts remarkably paralleled those of the Mena plaintiffs' proposals, and therefore adopts that portion of their proposed

redistricting plan that encompasses Dallas County. Under the Court approved interim plan, District 104 is a Hispanic district yielding 58.5% Hispanic VAP, while District 103 is a Hispanic impact district offering 41.3% Hispanic VAP, and a combined minority VAP of 53.4%. Districts 100, 109, 110, and 111 remain at percentages strong enough for Black voters in those areas to elect candidates of their choice.

H.B. 150 apportioned El Paso County into five districts. The DOJ objected to HB 150's reduction of Hispanic population in District 76, presently held by an Anglo incumbent. Though District 76 lies between two districts with Hispanic VAP in excess of 80%, the DOJ found the Hispanic voter registration was reduced by about four percentage points without an adequate jurisdiction. This was particularly objectionable in light

of the DOJ's finding that Hispanic voter registration had increased in that district over the past ten years, inferring the reduction was intended to protect an Anglo incumbent. Under this Court's interim plan, Hispanic population flowed from Districts 75 and 77 were reduced to Hispanic VAP's of 82.5% and 80.6% respectively. It is the opinion of this Court that the El Paso districts as drawn by the Court no longer dilute minority voting strength in District 26, and otherwise comply with Sec. 2.

The DOJ's objections to Bexar County focused on the apparent regression of Hispanic voting strength in District 117 resulting from the packing of Hispanics in District 118. While the DOJ did not object to the number of Hispanic seats drawn in H.B. 150 in Bexar County, which numbered five (5) with Hispanic VAP

above 55%, this Court finds that an interim plan can and should be drawn to provide Hispanics seven (7) districts with Hispanic VAP above 55%. This Court further finds District 117 as drawn under HB 150 is not an Hispanic seat as the Hispanic VAP is well under 55%. This Court's interim plan for Bexar County essentially mirrors the proposals offered by the Mena plaintiffs. Their proposals had been submitted to the DOJ in an attempt to obtain withdrawal of the Department's objections.

Objections were also made to the districts drawn in H.B. 150 located south and southwest of Bexar County, and north of Cameron and Hidalgo counties. The Legislature drew district lines 43 and 44 in an east-west manner that had the effect of packing Hispanics in the southern districts and overpopulating Anglos in the northern districts. The DOJ noted that this problem

would have been alleviated had the districts been drawn in a north-south configuration, and that an additional Hispanic district could have been created. This east-west configuration was viewed by the DOJ as intended to protect an Anglo incumbent. Under H.B. 150, the Hispanic VAP of District 43 is 75.0% while the VAP of District 44 is only 46.9%. These districts as drawn by the Court maintain District 43 at 66% Hispanic VAP, while increasing the Hispanic VAP in District 44 to 54.5%, and remedy the problems identified by the DOJ.

Finally, this Court concurs with the DOJ's objections to the reduction of Hispanic VAP in District 38 to protect an Anglo incumbent. This Court's interim plan moved Hispanics from District 36 into District 38, increasing the Hispanic VAP from 67.6% to 72.9%, while maintaining the Hispanic VAP in District 36 at 74.4%.

In order to arrive at an acceptable deviation level, the Court also moved a small number of Anglo voters from District 38 into District 37. This change had no appreciable effect on the Hispanic VAP in District 37.

IV. JUDGMENT

In is the intention of this Court by this Opinion and Judgment to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and by this Opinion and Judgment to provide for the holding of elections in Texas without delay and in accordance with existing state law. In developing equitable interim state legislative redistricting plans the Court has sought primarily to provide new or improved state House and Senate districts that provides a realistic opportunity for the election of racial and ethnic minority

candidates. Any partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the Court's emphasis on the interests of long-neglected minority concerns.

This Court has sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body. A conscientious inquiry, however, reveals even to the most casual political historian the long history of federal court intervention in Texas redistricting schemes in order to provide minimal protection to the electoral interests of racial and ethnic minorities. While past state legislatures have paid some tribute to these important interests, partisan concerns and preservation of incumbents appear paramount on

the decennial legislative agenda. The time-honored effects of adherence to these more parochial concerns have sometimes been an unspoken disservice to minority representation.

As the Regular Session of the 72nd Legislature concluded with the approval of H.B. 150 and S.B. 31, those state officials charged with presenting these legislatively-approved plans to the Department of Justice for required Voting Rights Act preclearance seemed unusually lethargic. This inaction is a central reason for the need of federal judicial action at this time in an effort to protect minorities' constitutional and statutory voting rights.

The legislative history of H.B. 150 and S.B. 31, coupled with the leisurely presentation of the Justice Department provides this Court with no real hope that

further deference to the legislature at this time would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights. For the interim, this Court will exercise its constitution responsibilities to provide protection to this latter group of often-neglected Texas citizens. Based on the findings and legal conclusions set forth in this Opinion it is the Judgment of this Court that the 1992 primary elections proceed as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in HB 1;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim

relief filed in cause number A-91-CA-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the 1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for

candidates to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Joint Motion for Interim Relief filed in all three causes December 6, 1991 is GRANTED, and that election precincts may be consolidated as contemplated in those motions.

SIGNED AND ENTERED this 24th day of December. 1991.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

s/s
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

GARWOOD, Circuit Judge, dissenting in part:

I join the majority's judgment and its essential reasoning in all respects excepts as follows:

In light of the fact that the Texas legislature has recently been called into special session commencing January 2, 1992, for the purpose of redistricting, in may view this Court's Order should expressly provide that in the event legislation is enacted effecting alternate redistricting, and/or postponement of the 1992 primary elections, and such legislation is precleared by the Department of Justice, and found not invalid by this or another court if challenged, and all this transpires in time such that review thereof by the Department of Justice and by this Court can ben had and thereafter the presently scheduled 1992 primary elections, or 1992

primary elections pursuant to any such postponed date (if any such postponement is timely precleared by the Department of Justice and not sooner found invalid by this or another court), may properly take place in 1992, then the interim plan adopted by this Court shall be of no force or effect as to the body or bodies so redistricted. I believe that this much is required by deference to the legislature in these matters. See, e.g., McDaniel v. Sanchez, 101 S.Ct. 2224, 2236 n.30 (1981).

SIGNED AND ENTERED this 24th day of December, 1991.

WILL GARWOOD
UNITED STATE CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 10, 1992 at 12:16 p.m.

LOUIS TERRAZAS, et.al.	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et.al.	§	

ORDER AND JUDGMENT

Before the Court is the State Defendants' Motion to Modify or Stay Judgment of December 24, 1991 said motion filed December 31, 1991. This Court has informed the plaintiffs that it would not take the motion under advisement pending expiration of the ten-day response time provided in the Local Rules and intends to rule on the instant motion before the 10th of January

1992. Plaintiffs filed their response January 8, 1991. Also before the Court is the State Defendants' Emergency Motion to Modify, Vacate, or Stay Judgment of December 24, 1991 said motion filed January 9, 1992. Upon review of the motions, and the entire file in this case the court finds the motions lack merit and should be DENIED.

State Defendants seek a stay of this Court's Judgment entered December 24, 1991 in which the Court ordered the 1992 primary elections be held pursuant to the Court's interim plans fashioned for the Texas House and Senate.[1] These plans were adopted by necessity upon this Court's finding that the legislatively-drawn

[1] Defendants do not seek to stay the portion of this Court's Judgment implementing on an interim basis the plan passed by the Legislature redistricting sets for the U.S. Congress.

plans redistricting those bodies potentially fail to adequately represent minorities as guaranteed by the Voting Rights Act. The State Defendants argue that once a federal court holds a state's election law contravenes the requirements of the Voting Rights Act, "the unbroken thread running through the federal law of redistricting and voting rights" requires this Court to allow the legislature to cure the defects in its redistricting plans before elections may be conducted pursuant to a Court-ordered plan. In light of the recently-concluded special session of the Texas Legislature, specifically called to attempt to pass new plans redistricting seats of the Texas House and Senate, Defendants argue this Court should stay its Judgment in the event new plans are passed, and those plans receive preclearance by the Department of Justice and pass review by this Court

after hearing, all to occur before January 10, 1992.[2] While this is a correct statement of the law regarding the imposition of permanent election plans, the cases cited by the State Defendants in support of their motion also impart the bedrock principle that federal courts possess considerable latitude in affording interim relief that might otherwise exceed the traditional constraints of comity and deference to the Legislature--primarily to insure that elections take place as scheduled under valid state law. See e.g., McDaniel vs. Sanchez, 452 U.S. 130, 150 n.30 (1981) (deference to legislature to devise acceptable replacement plan applies in normal case where legislature has adequate time to do so); Wise vs.

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[2] As evidenced by the testimony of the Texas Secretary of State, January 10, 1991 is a critical deadline, it being the latest filing date possible that wold allow the 1992 primary election to proceed as scheduled under the State's statutory scheme. R.at 94; see also Defendant's Exhibit 13.

Lipscomb, 437 U.S. 535, 540 (1978) (where imminence of state election renders legislative reapportionment impractical, federal courts may devise and impose interim redistricting plan pending later legislative action); Burns v. Richardson, 384 U.S. 73, 85 (1966) (imposition of interim plan fails clearly within court's discretion to ensure elections proceed as scheduled, particularly where plan does not remain in effect after legislature adopts acceptable permanent plan); Reynolds vs. Simms, 377 U.S. 433, 586 (1964) (district court did not abuse discretion by imposing provisional plans so upcoming primary elections could proceed as scheduled, after legislature failed to apportion itself within parameters set by U.S. Constitution); Seastrunk v. Burns, 772 F.2d 143, 151 (5th Cir. 1985) (deference to legislature stops at point court finds plan illegal under federal law, or where

preclearance has not been obtained); Jones v. City of Lubbock, 727 F.2d 364, 387 (1984) (court free to impose substitute plan after hearing and upon entry of findings holding legislative scheme violates federal law); Terrazas v. Clements, 537 F.Supp. 524, 527-528 (N.D. Tex. 1982) (panel implemented interim plans to prevent delaying elections). The United States Supreme Court refused to stay the Order in Terrazas. Terrazas vs. Clements, 456 U.S. 902 (1982).

In the present case, this Court's December 24, 1991 Judgment does no more than provide for the holding of 1992 elections as scheduled under Court-ordered interim plans that temporarily address voting rights deficiencies in the plans passed by the Texas Legislature. In denying the stay, the Court in no way intends to limit the efforts of the Legislature in adopting

acceptable permanent plans at any time it sees fit. Early in the second called Session, the Texas House approved this Court's interim plan redistricting that body for the 1992 primary elections, and fashioned a substitute permanent plan to be implemented for the 1994 elections. The Texas house indicated it approved the Court plan in order to guarantee that the elections go forward as presently scheduled. The objectives of the Texas Senate do not appear to be as clearly directed solely to the interests of Texas voters.

This Court fully recognizes that it should refrain from supplanting the policy choices of the Texas Legislature as expressed in HB 150 and SB 31 to the extent this Court has not found those choices in violation of federal law. It is evident that this Court has been able to do so to the satisfaction of the Texas

House. With regard to the Texas Senate, it is not evident that the Senate's dispute with this Court's interim plan centered on fair representation of minority interests; rather, it appears the Senate was primarily interested in fashioning a plan that better protects certain Anglo incumbents at the expense of minority voters' ability to elect candidates of their choice. This Court comes to such conclusions having reviewed the Senate plan submitted to this Court and the Department of Justice on the eve of the filing deadline, yet sees no indication that the Senate is attempting to devise a plan that would enhance minority voting strength over that provided in this Court's interim plan. As admitted in Defendants' January 9, 1992 motion, this substitute plan ("S.B. 1") adopted by the Legislature is identical to the one submitted by the parties in the Quiroz case in

Hidalgo County. That "Quiroz plan" was before this Court during the period in which it reviewed SB 31, found that law in violation of the Voting Rights Act, and drafted its interim plan. Had this Court believed that the "Quiroz plan" better addressed the interests of minority voters its plan would have more closely mirrored the Senate districts drawn by the parties in Quiroz.

A detailed comparison of the Court's interim plan with the "Quiroz plan" reveals that the Court's plan, and not Quiroz, provides a greater opportunity for all minority citizens of the State of Texas to elect representatives of their choosing. A cursory examination of the bottom line support this assertion: both Quiroz and the Court's interim plan create nine minority majority districts, but the Court's interim plan also

creates a minority impact district in the Dallas - Fort Worth metropolitan area that is lacking in the Quiroz plan. Additional hearing and evidence is not necessary for this Court to determine that the Legislature's adoption of Quiroz is not a response to minority concerns, but an impermissably partisan reaction to this Court's superior interim plan.

In the South Texas and Bexar County area, it appears that the plans are comparable in providing minorities an ability to elect representatives. Two of the six minority majority districts appear to be stronger under the Court's plan than under the "Quiroz plan", namely districts 20 and 21. Under the Court's plan, 59.7% of the voting age population ("VAP") in District 20 in Hispanic, while 59.4% of the VAP in District 21 is Hispanic. The numbers for the comparable districts

under the "Quiroz plan" (districts 20 and 19) are lower - - only 57.1% and 58.2% respectively. District 27 under the Court's interim plan also appears to better address minority concerns. The Hispanic VAP in District 27 is 76.8% under the Court's plan, lower than the 78.6% present to the "Quiroz plan's" District 27. In light of the testimony at the December hearing that District 27 was "packed" under SB 31, this Court feels that its interim plan better responds to minority concerns regarding district 27.[3] This Court further notes that the Democratic incumbent currently residing in that district. Senator Eddie Lucio, voted against SB 1.

The "Quiroz plan" and Court plans appear to provide comparable protection of minorities in two of

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[3] District 27 under both SB 31 and Quiroz have the identical Hispanic VAP of 78.6%.

the three remaining minority majority districts in the South Texas-Bexar County area. District 24 under the Court's plan has a combined minority VAP of 61.3%; the corresponding district under Quiroz had an almost identical combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP of 69.6%, while District 29 under the "Quiroz plan" only marginally increases the combined minority VAP to 70.3%. The only district in which the "Quiroz plan" appears to provide significantly greater protection to minorities is District 26, which has an Hispanic VAP of 59.7% and a combined minority VAP of 65.8%. The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and combined minority VAP of 55.8% and 60.2% respectively. Given that District 19 remains a strong

minority majority district under the Court's plan, this Court does not find this one district to be fatal to its plan. This Court further finds that the Democratic incumbent presently residing in this district, Senator Frank Tejeda, voted against the "Quiroz plan" stating to the print media that Quiroz impermissably split the Black voters in Bexar County.

In Dallas and Harris counties, the other two counties with minority majority districts, it also appears that the Court's plan better protects the interests of minority voters. In Harris County, both plans create two minority majority districts, one commonly referred to as the "Black district" (designated as District 13 under both plans), and the other referred to as the "Hispanic district" (designated as District 15 under the Court's plan and District 6 under Quiroz). The Black district is

significantly stronger under the Court's interim plan, with a Black VAP seven percentage points higher and a combined minority VAP nine percentage points higher than that provided under the "Quiroz plan". While the Hispanic district has a higher Hispanic VAP under the "Quiroz plan" than under the Court's plan (57.1% as compared to 51.5%), the combined minority VAP's are virtually identical under the two plans (66.9% as compared to 66.8%). In light of the testimony given at the December hearing that minority coalition voting does exist in Harris County, we are not convinced that the Hispanic district under the "Quiroz plan" is significantly stronger. We are convinced, however, that the Court's interim plan better protects minority interests in Dallas and Tarrant counties. Both the "Quiroz plan" and the Court's plan contain a minority majority district (District

23), with almost identical combined minority VAPs of 64.4% and 64.5%, respectively. The Court's plan, however, also provides for a minority impact district spanning Dallas and Tarrant Counties with a combined minority VAP of 48.5%. The "Quiroz plan" contains no such corresponding impact district.

In the absence of any laudable benefit to minorities, the Senate has only engaged in time-consuming partisanship. While such partisan goals may represent the policy choices of the Texas Senate, this Court finds it should not defer to those policies where doing so would result in postponement of the 1992 primary elections and the consequent tremendous drain on the public treasury for the apparent benefit of so few.

Any attempt by this Court to implement the substitute plan drafted by the Senate for the 1992

primary elections will necessarily and needlessly result in postponing those elections until at least mid-April of 1992. Under Texas law, a bill passed by a mere majority of both houses of the Legislature does not become effective as law until 90 days after adjournment of the session in which it was enacted. TEX. CONST. art. III, §39. This would include the proposed substitute plan, any statutory scheme aimed at avoiding this Court's Orders, as well as any enactment modifying the Texas Secretary of State's authority to reschedule elections on his own initiative. Here the Court is faced with either abiding by existing state law, i.e. the present statutory scheme calling for a March 10, 1992 primary election date, or suspending all proceedings until the Legislature's new proposal postponing the elections takes effect. This Court is not persuaded that it must be held hostage to

the "ninety-day rule", the effect of which would prevent this Court form relying on existing state law. What is left before the Court for review is legislative intent regarding the treatment of minorities and the rescheduling of elections. As discussed supra, this Court has found that minority voting rights can be enhanced to a greater degree than provided in a Quiroz-style plan. As for the rescheduling of elections the Court is of the following opinion.

Defendants seek relief similar to that discussed in Judge Garwood's dissent in part, though a careful reading of that dissent reveals that Judge Garwood was also concerned that the primary elections proceed as scheduled, but wished to make this Court's Judgment conditional on the Legislature's ability to obtain preclearance of any substitute plan from the Department

of Justice, and favorable review of that plan by this Court, all before the present filing date of January 10, 1991, or by some postponed date approved by the Department in advance. As evidenced by plaintiff's supplemental record filed January 6, 1991, it is apparent that the Department of Justice does not intend to "rubber stamp" the Senate's substitute plan even if it is identical to a previous submission that received preclearance. As part of that record, Assistant Attorney General John Dunne specifically states that any new plan submitted by the State of Texas for preclearance must now be judged against the standard of this Court's interim plan for the Senate, and that any decrease in minority voting strength in the new plan from that afforded by the Court's plan may give rise to a determination of discriminatory effect different from that

reached under an identical plan reviewed in another context. Given the Department's present posture, it does not appear that preclearance of any substitute plans can be obtained in a timely fashion so as to allow the 1992 primaries to proceed in March as provided by existing state law. It is also clear that any plan drafted by the Legislature cannot circumvent the Sec. 5 preclearance requirement merely because it has obtained the blessing of a federal court. Sanchez, 452 U.S. at 153. In order for this Court and the parties to technically comply with the procedural requirements of Sec. 5 and the effect of Texas law, the substitute Senate plan would not be submitted to the Department for review until after the enactment becomes law in April of 1992. As expressed by Mr. Dunne, the Department would then exercise its right to examine the plan and other materials submitted

for a sixty-day period. Assuming preclearance was obtained at the end of that time, parties plaintiff could, upon proper motion, request this Court to conduct hearings on any objections to the substitute Senate plan. In that event, it is only remotely possible that the primary elections could take place before early summer of 1992, well after the half-way point of the presidential preference campaign season.

During the December 11, 1991 hearing, the Texas Secretary of State, John Hannah, Jr., testified that postponing the primary elections would cost the taxpayers "in the neighborhood of ten to fifteen million dollars." R. at 68. As the March 10, 1992 elections involve a presidential preference primary. Hannah further testified that postponing the elections for candidates to the Texas House and Senate could confuse

voters and lead to their voting twice in one primary season, a possible felony under Texas law. R. at 69. Such confusion, his testimony continued, would also reduce voter turn out. R. at 77. Hannah also testified that postponing elections could void voter registration certificates should significant changes be made in voting precincts, which would further affect voter turn out. R. at 71. Of greater significance. Hannah also testified that moving the elections of May 1992 could have the effect of reducing Hispanic voting in the Rio Grande Valley because of the migrant farm seasons. R. at 83. According to the testimony of the State Defendants' own witness, postponing the elections for candidates to the Texas House and Senate would deserve the very group of voters who remain the focus of the litigation in Hidalgo County, and whose voting strength was

increased by this Court's interim plans after finding the legislatively drawn districts in The Valley did not satisfy the requirements of Sec. 2 of the Voting Rights Act.

Accordingly, this Court finds the stay should be denied to avoid postponing the 1992 primary elections as presently scheduled under valid state law for the following reasons. The attempts made by the Legislature to change the election dates in the event this Court does not adopt its plan for the Senate are not effective as law at the time of this Order. Any abatement of this Court's proceedings in order to allow those enactments to become law would delay the currently valid elections. As for the federal questions presented at this time, this Court further finds any attempt to adopt the legislatively-draw Senate plan would delay the elections since preclearance of that plan has not been obtained

and there has been no indication that it will be obtained in time for the elections to proceed as scheduled. Until formal comment on the substitute Senate plan ("Quiroz plan") has been made by the Department of justice, elections cannot proceed under the Legislature's proposed plan as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next few days, this Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act. Given the impending election schedule, this Court further finds that any attempt at this time to allow the Legislature to formulate a second substitute plan to cure the voting rights deficiencies is not required and would only unnecessarily delay the elections.

Absent Constitutional or federal statutory infirmity, this Court shall continue to avoid preempting state policy as expressed by the Legislature, despite its perception that those policies appear to be founded on purely partisan considerations. In unique circumstances, though, equity requires that deference by tempered by necessity. Implicity in the Supreme Court's willingness to vest a three-judge panel with the authority to decree that elections proceed on a timely basis is the recognition that the voting public is entitled to have some governmental body make a final determination that, at least temporarily, assures their ability to equally elect representatives of their choosing at the time set by law. After all, ensuring free and equal access to the ballot, not partisan considerations or the protection of incumbents, is the sole focus of federal law in the area of

redistricting and reapportionment seats legislative bodies. Should this Court stay its Judgment resulting in the postponement of elections, it is inevitable that new challenges to the substitute plans passed by the Legislature will be brought, and the litigation that has already consumed consideration state and federal judicial resources will begin anew. A state court in Hidalgo County, for example, has already attempted to extend the filing deadline for candidates to the Texas House in order to accommodate litigation challenging HB 150 and SB 31 under Texas law. Were this Court persuaded by the State Defendants' argument that it must always allow the Legislature to cure the redistricting plans found in violation of the law by this Court, it is conceivable that the elections could be rescheduled ad infinitum. The Court will not further the State's attempt to use the

thread of deference running through the federal law of redistricting and voting rights as a cordon preventing the voting public from expressing its collective will at the ballot until certain Anglo incumbents are more comfortable with their chances of success.

ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that the State Defendants' Motion for Stay is in all things DENIED, and that the 1992 primary elections proceed as presently scheduled under state law, with an election date of March 10, 1992;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that primary elections for the Texas Senate and Teas House of Representatives be conducted under this Court's interim plans attached as Appendices

A and B to this Court's Judgment entered December 24, 1991;

IT IS FURTHER ORDERED that the candidate filing deadlines for the 1992 primary elections to all offices remains January 10, 1992.

IT IS FURTHER ORDERED that the Commissioners Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in the these causes December 6, 1991, and that Dallas County, Harris County, and Bexar County may consolidate their county election precincts as contemplated in that joint motion.

SIGNED AND ENTERED this 10th day of January, 1992.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

s/s
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

GARWOOD, Circuit Judge, dissenting in part:

I respectfully dissent as to the Senate (Cause No. 91-CA-426). I would:

(1) Order a hearing on the Senate Plan (SB1 2nd CS) for early next week.

(2) Order that if before January 17 the Justice Department has determined that SB1 is not entitled to preclearance, the primary elections be held on the March 10 schedule and in accordance with our prior order.

(3) Order that if before January 17 the Justice Department has not acted with respect to preclearance on SB1, the primary elections be held April 11 pursuant to the schedule fixed in the legislation adopted earlier this month.

(4) Order that if the Justice Department preclears SB1 before January 17, this court should immediately issue its order with respect to whether SB1 complies with Section 2 of the Voting Rights Act and the United States Constitution; if it does, the primary elections should go forward March 10 on the basis of SB1 with appropriate modifications of the filing dates for the Senate; it if does not, this court's plan should be used for such elections.

Even though SB1 does not maximize minority representation and appears to do so to a lesser extent than the Senate plan previously ordered by this court, that does not necessarily mean that SB1 violates section 2. See Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985).

(5) If as a result of the above the primary elections are to be held April 11, but if the Justice

Department has not precleared SB1 prior to February 18, (the date fixed in the legislation enacted earlier this month), or if we should find SB1 to be invalid under section 2 or the Constitution notwithstanding preclearance by the Justice Department, then the April 11 primary elections should be held using the plan previously ordered by this court.

(6) If the primary elections are to be held April 11 as per the above, the before February 18, the Justice Department preclears SB1 and we do not find it invalid under section 2 or the Constitution, then April 11 primary elections should be held using SB1 for the Senate.

Under McDaniel v. Sanchez, 101 S.Ct. 2224 (1981), we cannot pass on SB1 until the Justice Department has acted on it for preclearance purposes,

but if it is precleared and we do not find it invalid, then McDaniel likewise teaches us we should give it appropriate legislative deference, notwithstanding the superiority of the plan ordered by this court.

s/s
WILL GARWOOD
UNITED STATE CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 13, 1992 at 2:01 pm

LOUIS TERRAZAS, et.al.	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	

AMENDED ORDER AND JUDGMENT

It has come to this Court's attention that certain minor factual errors were made in the explanatory portion of this Court's Order and Judgment of January 10, 1992. There errors do not in any way affect the decretal portion of that Order. To correct these errors, this Court hereby amends nunc pro tunc, five sentences on pages six and seven of its January 10, 1992 Order, as

follows. The third sentence of the first full paragraph on page six[1] is amended to read as follows: "Under the Court's plan, 57.9% of the voting age population ("VAP") in District 20 is Hispanic, while 58.7% of the VAP in District 21 is Hispanic." The sixth sentence of that same paragraph[2] is similarly amended to read as follows: "The Hispanic VAP in District 27 is 76.9% under the Court's plan, lower than 78.6% present in the "Quiroz plan's" District 27". In the second paragraph beginning on page 6 and continuing on page 7, the

[1] Prior to this order the sentence read "Under the Court's plan, 59.7% of the voting age population ("VAP") in District 20 is Hispanic, while 59.4% of the VAP in District 21 in Hispanic."

[2] Prior to this order the sentence read "The Hispanic VAP in District 27 is 76.8% under the Court's plan, lower than the 78.6% present in the "Quiroz plan's" District 27."

second and third sentences[3] are amended to read: "District 24 under the Court's plan has a combined under Quiroz had a slightly lower combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP to 70.3%." The fifth sentence of that same paragraph[4] is amended to read: "The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and

[3] Prior to this order these sentences read "District 24 under the Court's plan has a combined minority VAP of 61.3%; the corresponding district under Quiroz had a slightly lower combined minority VAP of 61.5%. Similarly, District 29 under the Court's plan has a combined minority VAP of 69.6%, while District 29 under the "Quiroz plan" only marginally increases the combined minority VAP to 70.3%."

[4] Prior to this order the sentence read "The corresponding district under the Court's interim plan is District 19, which has a lower Hispanic and combined minority VAP of 55.8% and 60.2% respectively."

combined minority VAP of 56.3% and 60.5% respectively."

No other portions of said Order and Judgement of January 10, 1992 are changed or affected.

SIGNED AND ENTERED this 13th day of January, 1992.

JAMES R. NOWLIN
UNITED STATES DISTRICT
JUDGE, for the COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 16, 1992 at 4:50 pm

LOUIS TERRAZAS, et al	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
	§	CIVIL NO. A-91-CA-428
BOB SLAGLE, et al.	§	

AMENDED ORDER AND JUDGMENT

Upon Consideration of the materials appended to the State Defendants' Corrected Emergency Motion to Modify, Vacate, or Stay Judgment of December 24, 1991 in referenced to Smith, Hidalgo, and Tarrant counties, this Court hereby amends its Order and Judgement of January 10, 1992, as previously amended January 13,

1992. The paragraph on page fifteen of the January 10, 1992 Order which read:

"IT IS FURTHER ORDERED that the Commissioners Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in these causes December 6, 1991, and the Dallas County, Harris County, and Bexar County may consolidate their county election precincts as contemplated in that joint motion."

is hereby amended to read as follows:

"IT IS FURTHER ORDERED that the Commissioner Court of Bexar County, Texas is included as a party to the Joint Motion for Interim Relief filed in these causes December 6, 1991, and that Dallas, Harris, Bexar, Smith,

Hidalgo, and Tarrant Counties may consolidate their county election precincts as contemplated in that joint motion."

No other portions of said Order and Judgment of January 10, 1992, as amended January 13, 1992, are changed or affected.

SIGNED AND ENTERED this 16th day of January, 1992.

_____

WILL GARWOOD
UNITED STATES CIRCUIT
JUDGE

_____

JAMES R. NOWLIN
UNITED STATES CIRCUIT
JUDGE

_____

WALTER S. SMITH, JR.
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed January 23, 1992 at 4:36 pm

LOUIS TERRAZAS, et.al.		
Plaintiffs,	§	
vs.	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, ET AL	§	
Defendants.	§	

NOTICE OF APPEAL

Bob Slagle, Chairman of the Democratic Party of Texas, herein collectively, "Defendant Slagle", hereby appeals and gives notice of his appeal to the Supreme Court of the United States of: (a) the order and injunction entered in the second full paragraph (not

counting the runover paragraph from the preceding page) on page 25 of this Court's Summary Opinion and Judgment which was filed on December 24, 1991; and (b) insofar as it affects the Texas Senate, the entirety of this Court's Order and Judgment which was filed on January 10, 1992, as amended on January 13, 1992, in the Amended Order and Judgment; and (c) the Court's Order and Judgment which was filed on January 10, 1992, as amended on January 13, 1992, in an Amended Order and Judgment, to the extent it compels the state to conduct all of its primaries on March 10, 1992, instead of April 11, 1992, using Senate Bill 1.

Defendant Slagle asserts that the three Judge Panel erred by (1) failing to conduct hearings upon the merits of S.B. 1 before entry of its interim plan; (2) failing to defer elections pending federal preclearance of

S.B. 1 till April 11, 1992; (3) failing to specify which State Senate districts of S.B. 1 fail to comply with Section 2 of the Voting Rights Act as required by Thornburg v. Gingles, 478 U.S. 30 (1986); (4) failing to apply concepts of legislative deference as established in McDaniel v. Sanchez, 101 S.Ct. 2224 (1981).

Respectfully Submitted,

ALLISON & ASSOCIATES
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Austin, Texas 78701
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By: s/s
James P. Allison
State Bar No. 01090000

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political

subdivision are not equally open to participation by members of a class citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment or no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different form that in force or effect on November 1, 1964, or whenever a State of political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the

second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification,

prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or

upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in

accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, ET.AL.,		
PLAINTIFFS,	)	CIVIL ACTION NO.
	)	A-91-CA-425
AND	)	
	)	
ROBERT A. ESTRADA,	)	
ET.AL.,	)	CIVIL ACTION NO.
PLAINTIFF/	)	A-91-CA-426
INTERVENORS,		
VS.	)	
	)	CIVIL ACTION NO.
BOB SLAGLE, ET.AL.,	)	A-91-CA-428
DEFENDANTS.		

****

ORAL DEPOSITION OF CARL N. STRINGFELLOW

****

ANSWERS AND DEPOSITION OF CARL N. STRINGFELLOW, a witness called by the Plaintiffs,

BRIGHT & ASSOCIATES
800 Rio Grande
Austin, Texas 78701
(512) 478-6971 Fax (512) 472-2911

taken before Kathleen Nevils, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 24th day of February, 1992, between the hours of 2:45 o'clock p.m. and 4:20 o'clock p.m., in the offices of McCamish, Martin & Loeffler, 98 San Jacinto Boulevard, Suite 2060, Austin, Texas, pursuant to the agreement of counsel for the respective parties as hereinafter set forth.

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For the General Services Commission:

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For the Texas Attorney General's Office:

ATTORNEY GENERAL'S OFFICE
By: JAVIER P. GUAJARDO
-and-
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Austin, Texas 78711-2025

(Before the commencement of the deposition, instruments were marked as Stringfellow Deposition Exhibits Nos. 1 and 2 for identification.)

CARL N. STRINGFELLOW

was called as a witness and, having been previously duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. WARBURTON:

Q. State your name, please.

MR. GUAJARDO: Wait. Before we do this, before we start, I'd like to follow the procedure that you-all have followed before and get the names of everybody present.

I'm going to object to the presence of Mr. Minton and Mr. Brown on the same grounds that they objected, to the presence of other individuals in the lawsuit that are not parties. They're not parties to

the Terrazas vs. Slagle lawsuit, and if we're consistent with Judge Garwood's order on the first deposition or the deposition of Representative Pierce, then they should not be allowed to attend.

MR. BASS: Defendant Slagle would join in that motion or objection.

MR. WARBURTON: Everybody want to identify themselves on the record

MR. MINTON: My name is Roy Minton.

MR. BROWN: My name is Dick Brown.

MR. GUAJARDO: Who do you represent, Mr. Minton?

MR. MINTON: I represent the Court. If you're telling me that you do not want -- that the Attorney General does not want us to be in here, if you'll just make that clear on the record, well, then, I don't have any problems with it.

MR. GUAJARDO: I don't know when you started representing the Court. I know you've represented the law clerks, and I think that, as a matter of course, if you represent the law clerks, you might be -- you might you possibly be able to represent the Court in this matter, and you are not parties to the litigation --

MR. MINTON: I fully understand.

MR. GUAJARDO: -- and Judge Garwood in this --

MR. MINTON: Wait a minute. You're wasting your time. All you need to do is to tell me that the Attorney General does not want me in here and I'll --

MR. GUAJARDO: I'm just saying that consistent with Judge Garwood's order, that ruling that he entered in the George Pierce deposition, that attorneys and non-parties would not be allowed in these discovery depositions, then Mr. Brown and Mr. Minton should not be here.

MR. MINTON: And you do not want me here; is that correct?

MR. GUAJARDO: Consistent with Judge Garwood's order, I would like both of you to leave, yes.

MR. MINTON: I fully understand.

MR. BROWN: Mr. Guajardo, I don't understand what you're saying, "consistent with Judge Garwood's order," because if you'll recall, there was an objection made under Rule 30 by the plaintiffs, and there was an objection made under Rule 30 by Mr. Pierce to people being present, and Judge Garwood ruled on a specific Rule 30 request.

Now, if you're just saying that the Attorney General does not want people here listening to

this man testify, including me, then that's fine. I'll get out of here.

MR. GUAJARDO: You will -- This is a public record that's being created. You can read it. Let me remind you, Mr. Brown, that when we were in the same situation, you threatened to walk out with Mr. Pierce if those other parties left. I'm not going to play that way with you. I'm just requesting you honorably to leave, and if not, we can get Judge Garwood to rule on this procedural question.

MR. BROWN: That's easy. I don't need the Court --

MR. MINTON: You've already made yourself clear on behalf of the Attorney

General as to where you are with the Court. I'm leaving. If that's your request, that's it.

(3)

No. 91-1546

In The

Supreme Court of the United States

October Term, 1991

BOB SLAGLE,

Appellant,

v.

LOUIS TERRAZAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

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April 1992

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Louis Terrazas, Ernest Angelo, Jr., Tom Craddick, Robert A. Estrada, and Sim D. Stokes, III ("**Appellees**"), respectfully move to dismiss this appeal or, in the alternative, to affirm the judgments of the United States District Court for the Western District of Texas in this case. Supp. Ct. R. 18.6. The reasons for dismissal or affirmance appear below.

STATEMENT OF THE CASE

The factual context underlying this appeal is discussed in the Appellees' Motion to Affirm in No. 91-1270, *Ann Richards, et al. v. Louis Terrazas, et al.* ("**State Appeal**"), filed on March 5, 1992. Like this proceeding, the State Appeal concerns interlocutory orders issued by a three-judge panel in *Terrazas v. Richards,* Nos. A-91-

CA-425, -426, in the United States District Court for the Western District of Texas, Austin Division ("**Austin Actions**"), involving redistricting plans for the Texas Legislature. Appellees are plaintiffs in the Austin Actions. Both Slagle and the Appellants in the State Appeal are defendants therein. Although the appellants in the two appeals did not file a joint appeal and do not assert the same grounds of error, the orders they attack are identical.

Briefly stated, the appeals concern orders issued in the Austin Actions for the implementation of interim redistricting plans for the Texas House of Representatives and the Texas Senate. Prior to the issuance of these interim plans, both redistricting schemes adopted by the state had been rendered unenforceable. In November 1991, the plan for the Texas House of Representatives was denied preclearance by the United States Department of Justice, pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The state's plan for the Texas Senate – created through an agreed state court judgment – was voided by the Supreme Court of Texas on December 17, 1991. *Terrazas v. Ramirez*, ___ S.W.2d ___, 35 Tex. Sup. Ct. J. 256 (Dec. 17, 1991).

One week after the state senate plan was voided, the three-judge panel in the Austin Actions issued interim plans for the Texas House and Senate for the scheduled March primary election. The plans were issued following a four-day trial on Appellees' request for implementation of interim plans. During the trial, over three hundred exhibits, including maps, compilations of statistical data, and population studies, were admitted. Twenty-five witnesses testified on behalf of the parties and *amici*, which included Appellees, the state, the chairmen of the state's political parties (including Appellant Slagle, who is the Chairman of the Democratic Party of Texas), several state senators, the commissioners' courts of the three largest counties in Texas, and the Department of Justice. Of

concern to the parties in the trial was the imminence of the Texas primary elections, which had been scheduled for "Super Tuesday" – March 10, 1992. Secretary of State John Hannah, Texas' chief election officer, testified that January 10, 1992, was the "drop dead" date for candidate filing in order to allow preparation for a March 10 primary election. Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 11, 1991, at 94. Secretary Hannah also testified that postponing the primary election could cost the state ten to fifteen million dollars, confuse voters, reduce voter turnout (especially among minority voters), and void voter registration certificates. Appendix to Jurisdictional Statement for Appellant Bob Slagle ("**Slagle's Appendix**") at 69a-70a.

Ten days after the issuance of the court's interim plans, the Texas Legislature met in special session. That session yielded plans for both the house and the senate. The legislation pertaining to the house left the court-ordered plan in effect for the 1992 electoral round. In the case of the senate, however, the legislature simply adopted the agreed state court plan that had been invalidated by the Texas Supreme Court. Neither plan received a two-thirds vote in both houses, and the statutes therefore could not take effect until the middle of April 1992, ninety days after passage. Tex. Const. art. 3, sec. 39.

After signature by the governor, the new senate plan was submitted to the Department of Justice for preclearance review. On March 9, 1992, the department informed the state that it would not preclear the new senate plan. *See* Appellees' Appendix A to Motion to Dismiss or Affirm ("**Appellees' Appendix**").

Although the state twice sought a stay pending appeal from the lower court, Slagle did not file a similar motion. Instead, he filed the instant appeal on January 23, 1992. On February 17, 1992, Slagle filed an emergency motion for stay pending appeal with this Court. Before

Appellees learned of this filing, Slagle's request for a stay was denied. *Slagle v. Terrazas*, ___ U.S. ___, 112 S.Ct. 1073 (Feb. 19, 1992).

According to Slagle's Jurisdictional Statement, the judgments of the court below should be reversed because: (a) the interim senate plan contains a population deviation of 9.98%; (b) one of the members of the panel below should have recused himself from the decision; and (c) both of the court's interim plans should have been precleared by the Justice Department before implementation. A review of the facts and law, however, shows that none of these contentions are correct, and that Slagle cannot show that the district court abused its discretion and must be reversed. The lower court was forced to fashion interim relief to preserve the scheduled primary: neither the form nor the substance of that relief is defective. More significantly, Slagle's appeal should fail because the injunction he seeks to overturn – ordering the conduct of a primary election under specific plans – now has been completely executed, and presents no live case or controversy for this Court to decide. Since it affects the Court's jurisdiction, the issue of mootness is discussed first and that discussion is followed by the reasons for affirming the judgments of the court below.

REASONS FOR DISMISSING THE APPEAL

A. THE ELECTIONS ORDERED BY THE DISTRICT COURT HAVE BEEN COMPLETED

The injunction Slagle seeks to reverse was issued on December 24, 1991, and directed the State of Texas and the chairmen of the respective political parties to conduct primary elections for the Texas House of Representatives and the Texas Senate under the interim redistricting plans created by the court. Slagle's Appendix at 45a-46a. After the state was unsuccessful in its attempts to stay this

order, it held the election as scheduled. The general primary election was held on "Super Tuesday," March 10, 1992, and the run-off primary was completed on April 14, 1992. While the occurrence of these elections does not appear in the record, this Court may take judicial notice of these undisputed and indisputable facts. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir.), *cert. denied*, 404 U.S. 967 (1971).

B. THE APPEAL IS MOOT

Because all of the specific relief afforded by the lower court's injunction was accomplished after issuance of the order and before disposition of the appeal, and because reversal of the injunction would not undo these actions, the review Slagle seeks should be dismissed as moot.

1. Mootness Defined

Article III of the United States Constitution limits federal courts to the adjudication of actual controversies between litigants. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). The mere presence of a disagreement, however sharp, is insufficient by itself to meet this constitutional requirement. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Mootness is part of the concept of justiciability, for the reason that federal courts are not empowered to decide questions that cannot affect the rights of litigants before them. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Because mootness destroys jurisdiction, the loss of the controversy during an appeal will result in dismissal. *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 239 (1985). Mootness on appeal may arise in a number of ways: settlement by the parties, *Lake Coal Co. v. Roberts & Shaefer Co.*, 474 U.S. 120 (1985); satisfaction of an unstayed judgment, *Sun-Tek Industries, Inc. v. Kennedy Sky Lites, Inc.*, 856 F.2d 173, 177 (Fed. Cir. 1988), *cert.*

denied, 488 U.S. 1009 (1989); or loss of the underlying right upon which the appeal is premised. *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 621 (7th Cir. 1985). Because of the altered complexion of the appeal, "the decision will neither presently affect the parties, nor have a more-than-speculative chance of affecting them in the future." *Transwestern Pipeline Co. v. F.E.R.C.*, 897 F.2d 570, 575 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 373 (1990). Thus, when reversal would not change the status of the legal interests of the parties, no real dispute exists, and the "case" is not justiciable. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968).

2. Defendants Complied With The Terms Of A Specific Injunction

The lower court's order was specific and limited: it required the state to conduct the primary elections using one discrete set of interim plans. Although it sought to stay the order, the state eventually complied with it. Since the order had not been stayed, the defendants were required to obey it even though that obedience might moot their appeals. *See American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245, 247 (5th Cir. 1980). In fact, the risk that intervening actions may remove the justiciable controversy is taken into consideration in determining whether a stay should be granted. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1323 (1980) (Powell, Circuit Justice).

Because satisfaction of an unstayed order deprives the appellate court of a live controversy to decide, *United States v. First State Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 908 (1981), when an appellant complies with a specific and direct order before the appeal is decided, the appeal is moot. *Seattle-First National Bank v. Manges*, 900 F.2d 795, 798 (5th Cir. 1990). This is true in the case of elections as well: when the election to which an injunction applies has been completed, any argument over its propriety is moot. *Socialist*

Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 588 (7th Cir. 1977), *aff'd*, 440 U.S. 173 (1979). As the Fourth Circuit held in dismissing an appeal from the denial of an injunction against an election: "The election has been conducted, so an injunction against it would now be meaningless." *Backus v. Spears*, 677 F.2d 397, 398 (4th Cir. 1982). More recently, this Court vacated part of an appeal from a three-judge panel that refused to enjoin unprecleared balloting procedures allegedly covered by section 5 of the Voting Rights Act: in *Watkins v. Mabus*, ___ U.S. ___, 112 S.Ct. 412 (1991), the Court noted that the "completion of the September 17 election has rendered this claim moot. . . . "

Since the lower court's injunction in this case was directed specifically only to the March 1992 primary, and since candidates for the general election have been chosen by that primary, the same result is warranted in this appeal. Reversing the injunction would not, as a practical matter, accomplish anything since the actions it mandated have been completed and the candidates have been selected. For this reason, this appeal – and the prior pending State Appeal – should be dismissed as moot.

REASONS FOR AFFIRMING THE JUDGMENTS

Even if this appeal presented a live controversy to decide, the judgments of the court below should be affirmed. That court correctly exercised its equitable jurisdiction to create and implement an interim senate plan that both preserved the existing primary schedule and improved minority voting rights.

A. THE QUESTIONS PRESENTED BY SLAGLE ARE INSUBSTANTIAL

In his Jurisdictional Statement, Slagle raises no question that would justify a reversal of the lower court's rulings. Instead, his ascriptions of error focus either on

matters long-resolved by prior decisions or on issues insufficient to justify reversal. Because Slagle fails to justify reversal of the judgments below, and because the lower court acted within its discretion under the facts, the judgments should be affirmed.

1. The Population Deviation Under The Interim Senate Plan Was Proper

Slagle contends that the lower court erred in crafting an interim plan that contained a 9.98% population deviation. This complaint ignores the fact that the plan is an interim plan, and thus is held to a less stringent standard than is applied to final court-ordered plans. *Compare Connor v. Finch*, 431 U.S. 407, 418 (1977) (deviation of over 16% not *de minimis* in final plan) *with Mahan v. Howell*, 410 U.S. 315, 332 (1973) (deviation of 10% permissible in interim plan). Five months ago, this Court affirmed an interim redistricting plan whose population deviation was eleven times greater than that found in the lower court's senate plan. *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.), *aff'd in part and vacated in part*, ___ U.S. ___, 112 S.Ct. 412 (1991). In *Watkins*, the court was left with less time to create a remedy than was available to the lower court in this appeal; accordingly, rather than craft its own plan, the court ordered the continued use of the 1982 lines on an interim basis. 771 F. Supp. at 807. Although the court recognized that the maximum population deviation between districts in the 1982 plan – over 110% – exceeded the benchmarks for both court-ordered and legislative plans, it determined that its "concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections." *Id.* at 804. Reaffirming that "[e]lections are for the voters," the court explained its decision:

> Although the deviation levels using existing districts would certainly be unconstitutional if this court were adopting a permanent reapportionment plan, we hold that elections may be constitutionally held using current districts *on an interim basis*. . . . We conclude . . . that the priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or this court.

Id. (emphasis in original).

Slagle attempts to distinguish *Watkins* on the basis that the Mississippi court implemented an old plan rather than drafting a new one. This, however, is a distinction without a difference: this Court's long-standing admonition to lower courts to strive for absolute population equality applies to "court-ordered" and not "court-created" plans. *Chapman v. Meier*, 470 U.S. 1, 26-27 (1974). Moreover, this guideline expressly directs only what the lower courts should "ordinarily achieve." *Id.* In this case, the court was confronted with an imminent deadline, and was passing upon Appellees' request for injunctive relief. An injunction, by definition an "extraordinary" remedy, *Younger v. Harris*, 401 U.S. 37, 45 (1971), seeks to achieve goals that are different than, and often exclusive of, the policies motivating final court-ordered redistricting plans. Thus, while this Court's summary affirmance of the relevant portion of *Watkins* does not define this its opinion, *Fusari v. Steinberg*, 419 U.S. 379, 391-392 n. (1975) (Burger, C.J., concurring), it does indicate that the court issuing the interim plan for Mississippi applied established principles. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Slagle also ignores the purpose and effect of the underpopulation in the interim plan. He contends that the court below "wholly failed to justify the unacceptable deviation" and that the "belated attempts of counsel [for

Appellees] to justify the plan do not rehabilitate the court's failure to do so." Jurisdictional Statement at 14. This is incorrect: while Slagle has limited his appeal to the issues he has raised, Sup. Ct. R. 14.1(a), 18.3, Appellees are permitted to defend the judgments "on any ground that the law and record permit." Sup. Ct. R. 18.6. In this case, the record amply demonstrates the rationale underlying the underpopulation of some minority districts that appears in the court's interim plan. During the trial that resulted in the interim plan, the state introduced the testimony of an attorney who represented the plaintiffs in the state court settlement that led to the agreed-upon senate plan rejected by the Texas Supreme Court in December 1991 ("***Quiroz* Plan**"). Counsel for these parties defended the underpopulation of minority districts created in the *Quiroz* Plan:

> If you draw districts that are precisely equal in population pursuant to the unadjusted census count, then those districts are actually overpopulated and packed with minority population. We felt that it was essential, therefore, that minority districts be drawn below ideal population . . .

Statement of Facts, Hearing on Plaintiffs' Request for Preliminary Injunction and Implementation of Interim Plan, December 13, 1991, at 229-230. It is clear that the lower court showed concern over the alleged minority undercount. In its interim senate plan, most of the minority districts are underpopulated to accommodate for the undercount: seven of the plan's ten districts in which minorities constitute the population majority are underpopulated by an average of 8,948 persons. Two of the other three minority districts are of ideal district size: only District 19 is overpopulated (by 234 persons, a .00043 deviation). Overall, the plan's average underpopulation of the ten minority districts is 6,264, while the

average overpopulation of Anglo majority districts is 4,288.

Slagle not only neglects this testimony, he refuses to discuss the effect of the population deviation. Further, his complaint that the court below did not relate the plan's underpopulation to "legitimate state concerns" is likewise misleading. It was the underpopulated minority districts in the *Quiroz* Plan that became the new legislative districts after the special session in mid-January 1992. The fact that the court below did not "justify" in its opinion a population deviation that was permitted by the law and supported by the record is not a ground for reversal. Slagle's disingenuous attack on a practice encouraged by and intended to help minority groups should be rejected, and the judgments should be affirmed.

2. Alleged Grounds For Recusal Of One Member Of The Panel Do Not Justify Reversal

Slagle dedicates more than half of the argument in the Jurisdictional Statement to contentions that one member of the panel should have recused himself, and that his failure to step aside mandates reversal of the judgments. Eschewing most of the facts, Slagle concentrates his efforts on innuendo and suspicion. In the space of a few pages, Slagle alleges that a federal judge relinquished his decision-making role to an interested party, catered to the secretly communicated wishes of two elected officials, bullied two other federal judges into accepting the result, and lied in his orders to cover up the facts. Leaving aside for a time his incorrect equation of recusal with reversal, discussed *infra*, a review of the facts and the law shows that Slagle's conspiracy theory is false.

The target of Slagle's argument is the Honorable James R. Nowlin, United States District Judge for the Western District of Texas, the senior member of the three-judge panel. Judge Nowlin presided over the Austin

Actions from their commencement in May 1991, and in June was joined by the Honorable Will Garwood, United States Circuit Judge for the Fifth Circuit Court of Appeals, and the Honorable Walter S. Smith, Jr., United States District Judge for the Western District of Texas, Waco Division.

Slagle alleges three grounds upon which he contends Judge Nowlin's recusal was mandated, but argues only two of them. Although in his statement of issues Slagle implies that testimony given by Judge Nowlin over ten years ago mandates his recusal, he nowhere discusses or even mentions this ground in the Jurisdictional Statement. Even if he had, it is clear that this unbriefed contention is in error. Slagle first sought recusal based on Judge Nowlin's 1982 testimony in an unrelated case in a motion filed June 17, 1991. That motion was denied by the court on July 23, 1991. Since that time, Slagle has participated in the Austin Actions, and made no objection to the participation of Judge Nowlin in any hearing or ruling until late January. Since he failed to present Judge Nowlin's alleged abuse of discretion until eight months after it purportedly occurred, Slagle is not entitled to reversal on the grounds of Judge Nowlin's prior unrelated testimony.

Moreover, the testimony in question concerned a redistricting plan crafted by the Texas Legislative Redistricting Board in 1982 after a court declared a plan formulated by the state legislature to be unconstitutional. Judge Nowlin was a member of the legislature when it enacted the plan in question, and his testimony was based on his experience and participation in the drafting of the legislative plan prior to his appointment to the federal bench. A judge's prior testimony about unrelated matters does not require recusal. *United States v. Outler*, 659 F.2d 1306, 1313 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 950 (1982); *Winters v. Travia*, 495 F.2d 839, 841 (2d Cir. 1974). Since the redistricting plan under attack now is not the plan that

Judge Nowlin testified about ten years ago, *see Terrazas v. Clements*, 537 F. Supp. 514, 541-42 (N.D. Tex. 1982), Judge Nowlin's decade-old testimony did not require recusal. *See Laird v. Tatum*, 409 U.S. 824 (1973).

The second set of allegations concerning Judge Nowlin focus on alleged *ex parte* contacts between him and three Republican state legislators, non-parties State Representatives George Pierce and Alan Schoolcraft and Intervenor State Senator David Sibley. Slagle's surmises concerning the existence and nature of these alleged contacts are no basis for voiding Judge Nowlin's participation in the judgments below, particularly since there is no evidence of contact with the latter two men.

Slagle's allegations concerning contact between Judge Nowlin and Representative Pierce parallel those made by the state in its unsuccessful attempts to persuade this Court to stay the implementation of the interim plan. In essence, Slagle claims that Judge Nowlin abdicated his bench to Pierce by allowing him to exercise judicial powers and draw a redistricting plan. These charges are grounded upon a misinterpretation of the record to create the spectre of a conspiracy of Republicans. Slagle mischaracterizes Pierce's testimony to suggest that Pierce actually worked on the computer to change the plan adopted by the lower court. A review of the computer records and the facts, however, reveals that this was not the case. In truth, two accounts (denominated "**NOWL**" and "**NOW2**") were opened for the use of the three-judge panel's law clerks. Pierce never saw the plan in account NOWL that became the court-ordered plan. Instead, Pierce was allowed to view a screen in the second account, NOW2, showing a portion of Bexar County. While Pierce was at the terminal, changes were made in the lines for Districts 19 and 26 involving thirty-five precincts in Bexar County. Pierce did not do anything in account NOWL, the source of the court's interim plan.

Later that day, one of the court's law clerks made some alterations in the NOWL plan. These changes were

not identical to those made when Pierce was with Judge Nowlin's other law clerk: some changes to the NOW2 plan were not made in NOWL, and some changes in NOWL never existed in NOW2. The sequence and descriptions of these changes are contained in a chart prepared by the state, which appears in Appellees' Appendix B.

Slagle's sleight-of-hand is easily seen against this backdrop. The charges that Pierce drew lines in the court-ordered plan rest on clever manipulation of the facts and careful crafting of allegations to lead to a false conclusion. The facts establish that Pierce never saw, let alone altered, the plan that became the court-ordered plan. While Slagle claims that changes can be transferred from one account to another, Jurisdictional Statement at 19, there is no evidence that anything Pierce did was transferred into the account holding the court-ordered plan. Slagle's allegations to the contrary are baseless.

Slagle also attempts to fabricate impropriety out of bare telephone logs. His efforts, which rely upon state telephone records that merely reflect that a call was placed from a state-owned telephone to another number, should be rejected. Slagle bootstraps his claims by drawing inferences from bare records and then portraying these inferences as facts requiring reversal of the judgments of a three-judge panel. In fact, the records Slagle uses (but does not present to this Court) do not demonstrate that Pierce called Judge Nowlin, or that the two spoke. Indeed, the records do not show even who placed or received a call, or whether a conversation took place; much less do they reflect the content of any conversation. This is significant, because almost all of the calls to which Slagle refers were two or three minutes long. Since the state's telephone system rounds off elapsed times, most may be nothing but calls to a receptionist.

This might seem like quibbling were it not for Slagle's attempt to add Representative Alan Schoolcraft

to the "conspiracy." Slagle alleges that "[o]ther evidence indicates that Alan Schoolcraft, a primary opponent of Pierce, also communicated with the court." Jurisdictional Statement at 20. This "evidence" (which Slagle does not offer), supposedly establishes that Schoolcraft was yet another politician to whom Judge Nowlin ceded his judicial power. Since Schoolcraft and Pierce were primary opponents, this charge does not seem to fit well with the alleged Pierce-Nowlin conspiracy. Moreover, during the state's attempt to stay implementation of the interim plan, Schoolcraft categorically denied calling the court or its chambers. *See* Appellees' Appendix C (Affidavit of Alan Schoolcraft). The baseless accusation concerning Representative Schoolcraft demonstrates the fallacy of the misuse of the telephone records.

The allegations related to Senator David Sibley, an intervenor below, also lack substance. Slagle distorts testimony by Democratic Senator Bob Glasgow, to suggest that Sibley, a lawyer, had improper contact with the court below. Jurisdictional Statement at 21. Slagle's evidence for this charge is nonexistent. He claims that Glasgow's testimony "indicates that Republican Senator David Sibley . . . also obtained knowledge of the content of the court-ordered plan prior to its issuance through *ex parte* communications." *Id.* In contrast to Slagle's conclusory summary of Glasgow's deposition, the testimony is less than dramatic. Glasgow merely said that Senator Chris Harris had said that Sibley had told him that "the Court's fixing to issue an order down there with new districts and it's sure going to take care of him." Transcript ("Tr.") of Glasgow Deposition, January 22, 1992, at 49. When asked if he had the impression that Harris thought Sibley knew what the plan was going to look like, Glasgow said "Senator – no. The only thing I'm going to say about that conversation is that when Senator Harris called me, he was in a state of anxiety. . . . " *Id.* at 50. Glasgow never discussed this with Sibley (Tr. at 56-57), who denies he

had contact with the court or advance knowledge of the plan. *See* Appellees' Appendix D (Affidavit of Senator David Sibley). Curiously, Sibley seems to provide Slagle with an all-purpose villain. In Slagle's second recusal motion filed below, Sibley's alleged prior knowledge of the contents of the interim plan formed the basis of an effort to disqualify Judge Smith, another member of the panel and a resident of Sibley's senate district. Before this appeal, the allegations concerning Sibley were never directed at Judge Nowlin. Instead, Slagle assumed that Sibley's "knowledge" – related through double-hearsay rumor – must have come from the federal judge sitting in Waco. Now that he is before this Court, Slagle tries to scrape together every innuendo he can to remove Judge Nowlin, including aspersions he formerly cast upon another judge. Regardless of the motivation, however, complaints based upon rumor and hearsay cannot form the basis of a recusal motion. *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985).

Given his distortion of the facts, it is surprising that Slagle offers no distortion of the applicable legal concepts. Nonetheless, Slagle barely addresses whether the law supports the proposition that recusal was required. This absence of analysis may be explained by the fact that the law demonstrates that Judge Nowlin was not required to recuse himself, and that his participation in and vote for the interim plan was proper.

Slagle admits that the recusal standard is determined from the perspective of a reasonable observer with knowledge of the facts, Jurisdictional Statement at 15, but then fails to employ the proper test. Instead, he relies upon the innuendo and suspicion that are the antithesis of an objective standard. *See Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990). Since recusal is proper only when the facts prove that an objective, knowledgeable member of the public would find a reasonable basis for doubting the court's impartiality, *In re United States*,

666 F.2d 690, 695 (1st Cir. 1981), the question of impartiality must be judged from the perspective of an uninvolved observer aware of the complete record. *In re Wirebound Boxes Antitrust Litig.*, 724 F. Supp. 648, 651 (D. Minn. 1989). To preserve objectivity, section 455 "permits the judge to edit the inaccurate allegations which could be the basis for disqualification under an appearance of partiality standard." *Idaho v. Freeman*, 507 F. Supp. 706, 721 (D. Idaho 1981).

Because the focus is upon facts and not suspicions, the fact that the limited changes Pierce made to the non-court plan in Bexar County actually increased minority voting age population in District 19 (an Hispanic majority district) is important. In fact, between December 23 and the issuance of the final court-ordered senate plan, the Hispanic voting age population of this district increased from 55.8% to 56.3% (1,644 voters). Conversely, Hispanic voting age population in the predominantly Anglo senate district to the north (Dist. 26) fell between those same times by 1,656 Hispanic voters. Thus, the changes made by Pierce in the NOW2 account would only serve to improve minority voting rights. A reasonable person with knowledge of all the circumstances would recognize this, and would not find the appearance of partiality.

Further, Slagle makes much of the supposed effect of Pierce's changes to the non-court account upon one of his Republican primary opponents. Inasmuch as the anxiety of the state Democratic party chairman over the electoral chances of Republican candidates is of dubious sincerity, it is unremarkable that the contention that the court allowed Pierce to damage Representative Jeff Wentworth's election chances is both legally and factually wrong. In the first place, neither representative was a party to the action. More important, however, is the fact that the court below waived the residency requirement

for primary elections under its interim senate plan, meaning that the alleged removal of Wentworth's residence from District 26 was of no consequence. This lack of legal effect was translated into practice on March 10, when Pierce finished a distant fourth in the Republican senatorial primary, far behind both Wentworth and Schoolcraft. In the run-off primary held April 14, Wentworth narrowly defeated Schoolcraft. Wentworth's victory, as well as Pierce's overwhelming defeat, expose Slagle's allegations for the cynical and baseless innuendoes that they are.

Finally with regard to the recusal contentions, Slagle adds two new claims never raised to the court below. These concern the employment by Judge Nowlin's law clerk by Appellee State Representative Tom Craddick as a legislative intern for four months in 1987 and Judge Nowlin's retention of counsel to represent him in an investigation being conducted by the Judicial Council of the Fifth Circuit. Since the court below cannot have erred as to matters never presented to it, *see Gabel v. Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988), these complaints should not be subject to appellate review. *Feigler v. Tidex*, 826 F.2d 1435, 1440 (5th Cir. 1987). This is especially true here, because Slagle never raised these points in his attempts to stay the lower court's orders: when a party "conspicuously omits" contentions of procedural impropriety that could have been corrected below, he may not raise them on appeal. *Conley v. Board of Trustees of Grenada County Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983). In any event, although Slagle is "weaving a new pattern in the course of this appeal," *Jusino v. Zayas*, 875 F.2d 986, 992 (1st Cir. 1989), these claims are demonstrably false.

First, the brief employment of one of Judge Nowlin's law clerks by one of the Appellees cannot create the appearance of partiality in the mind of an objective observer. While law clerks are forbidden to do all that is prohibited a judge, *Hall v. Small Business Admin.*, 695 F.2d

175, 179 (5th Cir. 1983), their views cannot be attributed to the judge. *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (1981). Even when the judge has been an attorney who represented a client suing a party for fraud years before in unrelated litigation, he does not abuse his discretion by refusing to recuse himself. *United States v. Hurst*, 951 F.2d 1490, 1503 (6th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3701 (U.S. Apr. 14, 1992) (No. 91-1573); *see also United States v. Seiffert*, 501 F.2d 974, 978 (5th Cir. 1974). Moreover, the fact that Slagle, who apparently has access to all of the state's records regarding the law clerk's employment, did not object to the participation of the clerk in the proceedings until now, indicates that recusal is inappropriate. *See In re Allied-Signal, Inc.*, 891 F.2d 967, 973 (1st Cir. 1989), *cert. denied*, 495 U.S. 957 (1990).

Second, the contention that Judge Nowlin's engagement of an attorney to represent him in the investigation of a complaint filed with the Judicial Council of the Fifth Circuit disqualifies him is ridiculous. Like everyone else, federal judges are entitled to a presumption of innocence. When the judge – who is ethically prohibited from answering charges in public – is made the subject of a complaint to the judicial council, his participation, whether alone or through an attorney, cannot supply grounds for recusal. The deposition that Judge Nowlin's counsel sought to attend concerned the functioning of the state's telephone system, which plays a central role in the accusations against Judge Nowlin but is not relevant to the underlying action. To suggest that a judge's attempt to protect himself in a judicial investigation disqualifies him from presiding over a case works only to undermine the public's confidence in the judiciary and encourages disgruntled litigants to file frivolous complaints to remove judges they do not like.

In view of the foregoing, Slagle is incorrect in arguing that Judge Nowlin was forced to recuse himself from

the Austin Actions. Of course, the focus of this appeal is not whether the court below abused its discretion in denying Slagle's recusal motions, but whether the claims Slagle makes are sufficient to require reversal of the judgments creating and implementing the interim redistricting plans. Slagle bases his request upon this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). However, *Liljeberg* concerned post-judgment (and post-affirmance) vacatur of a judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. 486 U.S. at 863. Since Rule 60 applies only to final judgments and is not a substitute for appeal, *Parks v. U.S. Life & Cred. Corp.*, 677 F.2d 838, 839 (11th Cir. 1982); *Brown v. McCormick*, 608 F.2d 410, 413 (10th Cir. 1979), its provisions are inapposite to appellate review of the preliminary injunction Slagle seeks to reverse. *See Bon-Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970). Nonetheless, even though Slagle attempts to use *Liljeberg* to cause the "considerable mischief" forecast by the dissent, 486 U.S. at 870 (Rehnquist, C.J., dissenting), the vacatur standard does not require reversal here.

In the first place, not all alleged *ex parte* contacts between the court and even parties requires vacatur of a judgment. *See Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir.), *cert. denied*, 482 U.S. 905 (1986). Moreover, unlike *Liljeberg*, in this case the plaintiffs are able to show a "special hardship by reason of their reliance on the original judgment." 486 U.S. at 869. Not only has the election mandated by the judgments below been conducted, the March primary represents the only vehicle by which Texas voters are able to choose candidates for the November general election. Since under Texas law candidates of the two major political parties must be chosen by primary, Tex. Elec. Code Ann. § 172.001 (Vernon 1986), "vacatur" of the judgments would deprive the electorate of the only legal candidates for the general election. Any change in the primary requirement – or any new primary

– is both unlikely and of dubious validity: not only is the Texas Legislature out of session, any change in Texas' election laws would require preclearance under section 5 of the Voting Rights Act. 42 U.S.C. § 1973c; 40 Fed. Reg. 43746 (1975). In fact, the state's most recent attempt to alter the selection of candidates from an elective to an appointive system was rejected last month by the Department of Justice. *See* Appellees' Appendix E (Letter from John R. Dunne, Assistant Attorney General, March 10, 1992). Thus, even if this case were judged by the same test applied in *Liljeberg*, the substantial risk of injury to the parties from vacatur would merit a different result.

Since vacatur under Rule 60(b)(6) is not applicable, what Slagle is seeking in essence is reversal on the ground that the court below received tainted evidence outside the record. However, the question really is not one of evidence, but one of remedy. The court below determined that no lawful senate plan existed and had to fashion a remedy to fill the void. In doing so, it could have adopted *in toto* a plan submitted by Appellees and its order would not be invalid on that basis. *See, e.g., Kaspar Wire Works, Inc. v. Leco Engin'g & Machs., Inc.*, 575 F.2d 530, 543 (5th Cir. 1978); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962-63 (5th Cir. 1975). Indeed, the Eleventh Circuit has rejected an attempt to recuse a judge who had *ex parte* conversations with one party's lawyer in which he told the party how he wanted to dispose of a motion, asked the party to draft his opinion, and then signed it with no material changes. *See In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

In re Colony Square arose out of a bankruptcy proceeding in which Colony Square was the debtor and Prudential Insurance was a creditor. 819 F.2d at 273. After a hearing, the judge called Prudential's lawyer, stated he intended to rule for Prudential, and outlined an opinion

that he asked the counsel to draft. *Id.* at 273-74. Following a few typographical changes, the court signed the opinion. *Id.* The opposing party was not notified of these *ex parte* contacts. *Id.* Similar events transpired on two other occasions. *Id.*

When Colony Square learned of these facts, it sought to vacate the orders and disqualify the judge. 819 F.2d at 273-74. These motions were denied by the bankruptcy court and the district court, and Colony Square appealed. *Id.* at 274. The Eleventh Circuit recognized that a court should not allow a party to "ghostwrite" its orders. *Id.* at 275-76. However, it noted that the bankruptcy judge had reached his own decision before asking Prudential's counsel to prepare the orders, and therefore had not abdicated his adjudicative role. *Id.* at 276. It thus held that the orders were valid. *Id.* at 276-77. It also rejected a claim that the *ex parte* contacts and ghostwriting required recusal, noting that its review of the case law revealed no decision requiring recusal under section 455(a) in such circumstances. *Id.* at 276 n.14.

Other courts have rejected efforts to recuse judges based on *ex parte* contacts. *See In re Little Rock School District*, 839 F.2d 1296 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). In *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982), the trial judge had several *ex parte* contacts with government attorneys. 664 F.2d at 1000-01. The Fifth Circuit recognized that section 455, like section 144, is meant to guard against personal, extra-judicial bias or the appearance of such bias. *Id.* at 1002. To be personal and thus disqualifying, there must be a bias stemming from an extra-judicial source that results in an opinion on the merits on some basis other than what is learned from participation in the case. *Id.* Because the *ex parte* contacts were made in the judge's judicial capacity and for proper

purposes, the Fifth Circuit held recusal was not warranted. Similar results are reached when the complaint centers on the court's *ex parte* review of documents submitted by one party. *See United States v. Sims*, 845 F.2d 1564, 1570 (11th Cir.), *cert. denied*, 488 U.S. 957 (1988); *United States v. Hillsberg*, 812 F.2d 328 (7th Cir.), *cert. denied*, 481 U.S. 1041 (1987); *United States v. Meester*, 762 F.2d 867, 884-85 (11th Cir.), *cert. denied*, 474 U.S. 1024 (1985); *United States v. Mapco Gas Products*, 709 F. Supp. 900, 901-02 (E.D. Ark. 1989). These cases all found that disqualification would be improper despite the fact that the judges had reviewed materials submitted by one side *in camera*, or submitted by a third party. In view of these decisions, there was no basis to require recusal of Judge Nowlin. Since recusal was not required, the lower court's ruling was correct. Slagle cannot establish an abuse of discretion, and the judgments below should be affirmed.

As an apparently alternative argument, Slagle contends that Judge Nowlin's allegedly improper actions should cancel out his vote in favor of the interim plans. As support for this contention, Slagle cites *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). A brief review of the facts in *Lavoie* shows why Slagle's argument is specious. First, *Lavoie* did not concern a recusal motion under 28 U.S.C. § 455(a), the statute Slagle claims Judge Nowlin violated. Instead, the issue was whether the Due Process Clause of the Fourteenth Amendment required vacatur of an Alabama Supreme Court decision against an insurance company, which was authored by a justice who had a remarkably similar pending lawsuit against another insurance company. *Id.* at 817. According to the Court, the question concerned the justice's alleged personal stake in the outcome of the case, not the appearance of impartiality: "The record in this case presents more than mere allegations of bias and prejudice. . . . " 475 U.S. at 821. After analyzing both the similarities between the justice's personal lawsuit and the case at bar and the

effect the decision would have on his possible recovery, the Court held that the justice's interest was "direct, personal, [and] pecuniary. *Id.* at 824 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The Court expressly avoided any analogy between its decision concerning direct financial interest and judicial bias:

> We need not decide whether allegations of bias or prejudice of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required . . .

Id. at 821. Because the Alabama Supreme Court's opinion had been issued by a 5-4 margin, the determination that one justice's favorable vote violated the Constitution required vacatur of the judgment. *Id.* at 828.

In contrast to the constitutional issues raised in *Lavoie*, Slagle premises his attack upon the judgments on section 455(a) and allegations of *ex parte* contact between Judge Nowlin and the aforementioned state legislators. In general, such contacts do not raise constitutional concerns *per se*. *See Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (rejecting "any notion of due process which would place an absolute prohibition on all *ex parte* contacts or proceedings."). When the constitutional standard is compared to the test invoked by Slagle's employment of section 455(a), it is clear that the statutory test requires a greater showing before vacatur is warranted. *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) ("The inquiry commanded by section 455 and that commanded by the Due Process Clause are not the same"). The criterion under the statute is the *appearance* of partiality, while the constitutional standard is *actual* partiality. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). By confusing these standards and assuming that recusal

automatically requires vacatur, Slagle misframes the issue. To the extent he can even prove their existence, Slagle cannot show that any of the alleged *ex parte* contacts resulted in a plan that was either partial or unsupported by the extensive record.

The second reason the recusal path does not lead to vacatur is practical. Voiding Judge Nowlin's vote in support of the December 24 judgment and plan would not result in a 1-1 decision. Slagle oversimplifies the purpose and range of Judge Garwood's partial dissent by characterizing it as a "no" vote. Instead, his opinion shows that he conditioned his approval of an interim plan on the possible failure of the state to adopt and obtain preclearance of a legislative plan in time for the scheduled election (or a precleared later-scheduled election). *See* Slagle's Appendix at 48a. Since the state failed to accomplish this, none of the jurisprudential barriers seen by Judge Garwood were raised. Judge Garwood accepted the plan but urged deference: since the state failed timely to present anything to defer to, his partial dissent did not disagree with anything the lower court did. For this reason, setting aside Judge Nowlin's vote would be of no practical consequence.

Because Slagle's claims of judicial wrongdoing are unsubstantiated by facts and insubstantial to require disqualification, the lower court's denial of his recusal motions was proper. Because the recusal issue is not directly before this Court, and because its indirect involvement does not implicate the validity of the orders, the judgments should be affirmed.

3. Preclearance Of The Court's Interim Senate Plan Was Not Required.

Slagle's final argument is that the lower court's interim plan is virtually the same as the plan Appellees

submitted during trial, and thus cannot be enforced without preclearance by the Department of Justice. This position seems to be at odds with Slagle's earlier claim that the interim plan was crafted in part by Representative Pierce. Moreover, Appellees' proposed senate plan, S562, contained thirty-one districts of equal size. *See* Exhibit 65b, admitted Dec. 13, 1992. For Slagle to contend that the court's interim plan is invalid both because it deviates impermissibly from absolute population equality and because it is identical to a zero deviation plan defies logic. According to logic, both contentions cannot be correct. According to the law, neither contention is correct.

The interim plan is an injunctive order of a federal court. It does not require preclearance because it does not "reflect the policy choices" of the state, 28 C.F.R. § 51.18(a), a fact proven by the state's unrelenting attempts to overturn it. Slagle also fails to mention the rules governing preclearance, which state:

> A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court.

28 C.F.R. § 51.18(c). In fact, earlier this year the Justice Department filed a brief before a three-judge panel in the District of Columbia in which it dismissed Slagle's argument as unsupported by the Voting Rights Act. According to the department:

> The *Terrazas v. Slagle* plan was formulated by [the Austin] court and, as evidenced by the state's ardent opposition to the plan, it does not reflect the state's policy choices. Accordingly, it is not subject to Section 5 preclearance. . . .

Memorandum of the United States in Opposition to State of Texas' Motion for Partial Summary Judgment, *State of Texas v. United States*, Civil Action No. 91-2383, in the United States District Court for the District of Columbia ("**D.C. Action**"), at 17.

This opinion is significant, since the department's "construction of the Act is persuasive evidence of the original understanding, especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978). When the department does not inform the submitting authority that a submitted change need not be precleared, it implies that preclearance is required. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985). *A fortiori*, when the department informs the authority that preclearance is not required, deference is due that interpretation. *See Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978). Indeed, on February 25, 1992, the court in the D.C. Action agreed with the department, and issued an order denying the state's summary judgment motion, in part on the grounds that the lower court's plan in this case did not need to be precleared. *See* Appellees' Appendix C (Memorandum Order) in No. 91-1270, *Richards, et al. v. Terrazas, et al.*

Finally, any similarities between the interim plans and plans drafted by the legislature or the litigants do not change the fact that the interim plan constitutes court-ordered relief. The lower court was required to give deference to the legislature's plans where possible, and its use of portions of those plans is neither improper nor unusual. *Cf. Terrazas v. Clements*, 537 F. Supp. 514, 527-28 (N.D. Tex.), *aff'd*, 456 U.S. 902 (1982). Interim plans can be unconstitutional if necessary, *Watkins v. Mabus*, 771 F. Supp. at 804, and do not need preclearance.

B. REVERSAL OF THE JUDGMENT WOULD ADVERSELY AFFECT MINORITY VOTERS

The foregoing discussion shows that Slagle's Jurisdictional Statement fails to support reversal. Appellees' motion to affirm, however, is not limited only to rejection of these issues, Sup. Ct. R. 18.6, and Appellees assert that the lower court's judgments should be affirmed because

they served to protect minority voting rights threatened by the action and inaction of the state.

Like the state, Slagle professes concern for the voting rights of minorities. However, also like the state, Slagle does not bother to compare the lower court's interim senate plan with the *Quiroz* Plan (which after the January special session following the issuance of the court's plan became Senate Bill 1 ["**SB1**"]). While it is not accurate to say that the lower court considered SB1 before issuing its decision (because SB1 did not then exist), it did consider the *Quiroz* Plan, SB1's illegal predecessor. Slagle's refusal to compare the plans is understandable: placed side-by-side, the lower court's plan clearly is superior.

The lower court's interim plan contains ten districts with a total minority population over 54%, while SB1 contains only nine districts with a total minority population over 46%. More significantly, the court's interim plan contains nine districts with a minority voting age population ("**VAP**") in excess of 60%. This improves upon SB1, which contains only eight districts with a minority VAP in excess of 60%. Further, the interim plan contains ten districts with a minority VAP in excess of 48%. SB1, on the other hand, contains only nine districts with a minority VAP in excess of 48%.

Given the interim plan as a benchmark, it is clear that implementation of SB1 would result in a retrogression of minority voting strength. At least one of SB1's so-called minority districts (Dist. 20) has a minority VAP under 60%. In addition, elections under SB1 would deny minority voters in Dallas/Fort Worth the electoral opportunity they have under the court's interim plan, which draws District 12 as a minority impact district with a total minority population of 54.1% and a minority VAP of 48.5%. SB1 has no impact districts: a gap of 18.2% separates the minority VAP of its smallest minority district (Dist. 20 - minority VAP 59.8%) and the next largest district in minority population (Dist. 15 - minority VAP

41.6%). Thus, minority voters have at best a chance of electing eight or nine candidates of their choice under SB1. Under the lower court's plan, it is virtually certain that nine minority candidates will be elected, and very possible that ten such candidates will prevail.

Although the issue before this Court is not whether to preclear SB1, the marked distinctions between the plans are important. Slagle asks this Court to overturn the interim plan, and to order it replaced by SB1 (despite its lack of preclearance). Since the interim plan issued from the lower court's equitable jurisdiction, *see Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Mahan v. Howell*, 410 U.S. at 332, fairness is a legitimate consideration. Moreover, as noted *supra*, Texas already has conducted the only legal election provided for under its laws. Between special sessions, Justice Department preclearance, and inevitable legal challenges, any new primary before the 1992 general election could not take place before this summer. It is well-settled that such a late primary adversely affects voter turnout, especially among minority voters. *See Garcia v. Guerra*, 744 F.2d 1159, 1164-65 (5th Cir.), *cert. denied*, 471 U.S. 1065 (1984). By preserving the established election schedule and improving minority electoral opportunity, the lower court acted to help those voters ignored by the state's politicking.

CONCLUSION

Because the specific order issued by the court below has been fully complied with, this appeal is moot. Since reversal will change neither the fact nor the results of the 1992 primary, affording Slagle the relief he seeks will not, as a practical matter, accomplish anything. For this reason, this appeal should be dismissed.

Even if there remained a live controversy to decide, the questions raised by Slagle are insubstantial. In crafting an interim plan in the context of a preliminary injunction, the district court attempted to strive for population

equality within the confines of the significant minority undercount believed to exist in the 1990 census. Though not required to achieve zero population deviation, the lower court underpopulated minority districts within the bounds allowed a state legislature. Further, the allegations concerning one member of the panel below do not suffice to require his recusal. Even less do Slagle's guesses and speculations provide a reason to reverse judgments agreed to in substance by two other members of the court. Finally, the contention that the court's injunction and the plan it contained required preclearance is unfounded: orders of federal courts are remedial in nature, and do not reflect legislative policy choices or suffer the political maneuvering that may threaten minority voters. Since even unconstitutional plans – which presumably could not survive preclearance – can be implemented on an interim basis, the court's issuance of a plan that is legal and demonstrably superior to later legislative efforts was proper. For all of these reasons, the lower court's judgments should be affirmed.

For the foregoing reasons, Appellees respectfully request that the Court dismiss this appeal as moot, or, in the alternative, summarily affirm the decisions of the district court below.

Respectfully submitted,

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APPENDIX A

(SEAL)

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General — *Washington, D.C. 20530*

March 9, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Senate Bill No. 1 (1992), which provides the redistricting plan for the Senate of the State of Texas, submitted to the Attorney General pursuant to Section 5 of the voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on January 9, 1992; supplemental information was received on January 10, 1992.

We note that the submitted redistricting plan is substantively identical to the plan resulting from the settlement of state court litigation in October 1991. *Quiroz v. Richards,* No. C-4395-91F (332nd Jud. Dist. Ct., Hidalgo County, Tex.); *Mena v. Richards,* No. C-454-91-F (332nd Jud. Dist. Ct., Hidalgo County, Tex.). As you know, that plan received Section 5 preclearance on November 18, 1991. Since then, there have been significant new developments and submission of new information regarding that redistricting plan.

In December 1991, the Texas Supreme Court invalidated the settlement, thereby precluding its further implementation. *Terrazas v. Ramirez*, No. D-1817, 1991 WL 269035 (Tex. Dec. 17, 1991). One week later, the three-judge federal court in *Terrazas v. Slagle*, No. 91-CA-426 (W.D. Tex. Dec. 24, 1991) ("*Terrazas*"), adopted its own interim plan for Senate elections in 1992.

In January 1992, the legislature enacted the submitted Senate redistricting plan, and the state sought to supplant the *Terrazas* court plan with the enacted plan. The *Terrazas* court denied the request to stay implementation of the court's plan for the 1992 elections and, in its January 10, 1992 opinion ruled that the enacted plan could not be implemented, even if it were precleared under Section 5, because it "fails to satisfy the Sec. 2 requirements of the Voting Rights Act," op. at 12-13.

We know that the state has appealed the relevant rulings in the *Terrazas* action, and that the appeal is pending in the United States Supreme Court. On several occasions, however, the Supreme Court has declined to stay the use of the *Terrazas* court's Senate redistricting plan for the 1992 election. Thus, at this time the extant orders in the *Terrazas* action preclude the implementation of the submitted redistricting plan for the 1992 election. Moreover, the finding that the submitted plan violates Section 2 would appear to preclude its use thereafter.

Under these circumstances, it is not clear that the state is entitled to invoke Section 5 to obtain either an administrative or judicial determination on the merits of the submitted plan. We recognize that the Supreme Court's decision on the state's appeal in *Terrazas* may

determine whether the submitted plan is capable of implementation. But in view of the statutory time constraints, an administrative determination under Section 5 may not be deferred pending that ruling.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 520 (1973); see also Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, preclearance may not be obtained for a voting change that clearly violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. 1973; 28 C.F.R. 51.55 and 51.56.

In this situation, a federal district court has ruled that the submitted redistricting plan may not be used, in part, because the plan violates Section 2. That ruling, although challenged by the state, has not been vacated or reversed. Accordingly, I cannot conclude, as I must under the Voting Rights Act, that the plan meets the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the redistricting plan contained in Senate Bill No. 1 (1992).

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted redistricting plan from the United States District Court for the District of Columbia. As you are aware, the state has indicated it may do so in the context of the pending, preclearance litigation concerning statewide redistricting. *Texas v. United States*, No. 91-2383 (D.D.C.).

The state also may request that the Attorney General reconsider the objection. In addition, reconsideration at the instance of the Attorney General may be appropriate "[w]here there appears to have been a substantial change in operative fact or relevant law." 28 C.F.R. 51.46(a). However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted redistricting plan for the Texas Senate continues to be legally unenforceable under Section 5. *Clark v. Roemer*, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/ John R. Dunne

John R. Dune
Assistant Attorney General
Civil Rights Division

APPENDIX B

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/18/91				NOW2S500	created S500 from Mena Plan (S560)	Buchanan
NOW2	12/18/91	TMH	9:07 PM	9:40 PM	NOW2S501	created S501 from Fair Redistricting (S562)	Buchanan
NOWL	12/19/91	SLD	10:53 AM	12:05 PM	NOWLS500	created S500 from SB31 (S552)	Buchanan or Bray
NOWL	12/19/91	SJK	1:26 PM	3:54 PM	NOWLS500	modified S500	Bray, Carl
NOW2	12/19/91	TMH	3:13 PM	4:49 PM	NOW2S501	modified S501	Buchanan, Randall
NOWL	12/19/91	SJK	3:57 PM	4:08 PM	NOWLS500	modeling started, S500 recalculated	Bray, Carl
NOWL	12/19/91	SJK	4:09 PM	4:32 PM	NOWLS500	modified S500	Bray, Carl
NOWL	12/19/91	SJK	4:44 PM	5:55 PM	NOWLS500	modified S500	Bray
NOW2	12/19/91	TMH	4:50 PM	4:50 PM	NOW2S501	changed plan description	Buchanan, Randall
NOWL	12/19/91	SJK	6:00 PM	6:00 PM	NOWLS502	created S502 as new computer plan	Bray
NOWL	12/19/91	SJK	6:00 PM	6:46 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	8:20 PM	9:33 PM	NOWLS502	modified S502	Bray
NOWL	12/19/91	CWK	9:36 PM	9:36 PM	NOWLS501	copied by district from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS502	NOWLS503 merged into S502	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	created S503 from SB31 (S552)	Bray
NOWL	12/19/91	CWK	9:40 PM	9:40 PM	NOWLS503	S503 merged into NOWLS502	Bray
NOWL	12/19/91	CWK	9:43 PM	11:46 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/19/91	CWK	11:47 PM	12:01 AM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	1:28 PM	3:14 PM	NOWLS502	modeling started, S502 recalculated	Bray
NOWL	12/20/91	SRH	3:16 PM	4:11 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	3:24 PM	4:15 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	4:13 PM	4:53 PM	NOWLS502	modified S502	Bray
NOW2	12/20/91	TMH	4:18 PM	4:18 PM	NOW2S502	created S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:21 PM	4:21 PM	NOW2S501	replaced county 023 from NOW2S502	Buchanan, Munn
NOW2	12/20/91	TMH	4:24 PM	4:24 PM	NOW2S501	S501 recalculated	Buchanan, Munn
NOW2	12/20/91	TMH	4:25 PM	4:50 PM	NOW2S501	modified S501	Buchanan, Munn
NOWL	12/20/91	SRH	5:05 PM	5:12 PM	NOWLS504	created S504 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS504	NOWLS505 merged into S504	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	created S505 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	5:19 PM	5:19 PM	NOWLS505	S505 merged into NOWLS504	Bray
NOWL	12/20/91	SRH	5:20 PM	7:22 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	8:45 PM	9:25 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	9:36 PM	10:21 PM	NOWLS504	modified S504	Bray

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOWL	12/20/91	SRH	10:27 PM	10:49 PM	NOWLS504	modified S504	Bray
NOWL	12/20/91	SRH	10:51 PM	11:12 PM	NOWLS502	modified S502	Bray
NOWL	12/20/91	SRH	11:17 PM	11:30 PM	NOWLS506	created S506 from Fair Redistricting (S562)	Bray
NOWL	12/20/91	SRH	11:33 PM	11:48 PM	NOWLS506	modified S506	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS505	NOWLS507 merged into S505	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	created S507 from SB31 (S552)	Bray
NOWL	12/20/91	SRH	11:52 PM	11:52 PM	NOWLS507	S507 merged into NOWLS505	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS506	NOWLS507 merged into S506	Bray
NOWL	12/20/91	SRH	11:56 PM	11:56 PM	NOWLS507	S507 merged into NOWLS506	Bray
NOWL	12/20/91	SRH	11:57 PM	11:59 PM	NOWLS506	modified S506, session continued till 12/21/91	Bray
NOWL	12/21/91	SRH	12:00 AM	12:12 AM	NOWLS506	modified S506, session began on 12/20/91	Bray
NOWL	12/21/91	BDM	10:11 AM	1:08 PM	NOWLS506	modified S506	Bray
NOWL	12/21/91	RKB	2:21 PM	3:00 PM	NOWLS508	created S508 from Fair Redistricting (S562)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS508	NOWLS509 merged into S508	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	created S509 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	3:10 PM	3:10 PM	NOWLS509	S509 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	3:11 PM	4:18 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS504	S504 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:23 PM	4:23 PM	NOWLS508	NOWLS504 merged into S508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS502	S502 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:28 PM	4:28 PM	NOWLS508	NOWLS502 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS508	NOWLS510 merged into S508	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	created S510 from SB31 (S552)	Bray
NOWL	12/21/91	RKB	4:39 PM	4:39 PM	NOWLS510	S510 merged into NOWLS508	Bray
NOWL	12/21/91	RKB	4:40 PM	5:04 PM	NOWLS508	modeling started, S508 recalculated	Bray
NOWL	12/21/91	RKB	5:04 PM	5:15 PM	NOWLS508	modified S508	Bray
NOWL	12/21/91	RKB	5:20 PM	5:20 PM	NOWLS508	replaced county 339 from NOWLS501	Bray
NOWL	12/21/91	RKB	5:22 PM	5:22 PM	NOWLS508	S508 recalculated	Bray
NOWL	12/21/91	RKB	5:23 PM	6:25 PM	NOWLS508	modified S508	Bray
NOWL	12/22/91	SDS	10:07 AM	11:29 AM	NOWLS508	modified S508	Bray
NOW2	12/23/91	BDM	11:39 AM	11:51 AM	NOW2S501	modified S501	Munn
NOW2	12/23/91	BDM	11:51 AM	11:55 AM	NOW2S501	NOW2S501 saved to NOW2S503	Munn
NOW2	12/23/91	BDM	11:56 AM	11:56 AM	NOW2S501	saved S501	Munn

Activity in Court Computer Accounts

Account Number	Date	Operator	Beginning Time	Ending Time	Plan #	Activity	Planner
NOW2	12/23/91	BDM	11:58 AM	11:58 AM	NOW2S503	S503 created from NOW2S501, description modified	Munn
NOW2	12/23/91	BDM	11:58 AM	12:02 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:03 PM	12:24 PM	NOW2S503	modified S503	Munn
NOW2	12/23/91	BDM	12:26 PM	12:26 PM	NOW2S503	description of S503 modified	Munn
NOWL	12/23/91	RVH	5:52 PM	6:25 PM	NOWLS508	modified S508	Buchanan

Plan: S501
Date Created: 12/18/91

Audit File

CF	91-10-23	2:43	PM	plans562	----------	redrvh plan	Copy from another client
MI	91-12-18	9:07	PM	now2s501	----------	redtmh now2	Modeling started
MO	91-12-18	9:40	PM	now2s501	----------	redtmh now2	No changes saved
MO	91-12-18	9:40	PM	now2s501	----------	redtmh now2	Exited Modeling
MI	91-12-19	3:13	PM	now2s501	----------	redtmh now2	Modeling started
MS	91-12-19	4:48	PM	now2s501	----------	redtmh now2	Plan Modeling Save
MO	91-12-19	4:48	PM	now2s501	----------	redtmh now2	Changes saved
MO	91-12-19	4:49	PM	now2s501	----------	redtmh now2	Exited Modeling
ED	91-12-19	4:50	PM	now2s501	----------	redtmh now2	Description modified
MI	91-12-20	3:24	PM	now2s501	----------	redtmh now2	Modeling started
MS	91-12-20	4:14	PM	now2s501	----------	redtmh now2	Plan Modeling Save
MO	91-12-20	4:14	PM	now2s501	----------	redtmh now2	Changes saved
MO	91-12-20	4:15	PM	now2s501	----------	redtmh now2	Exited Modeling
RP	91-12-20	4:21	PM	now2s501	now2s502	redtmh now2	Replaced cnty:023
RC	91-12-20	4:24	PM	now2s501	now2s502	redtmh now2	Plan Recalculated
MI	91-12-20	4:25	PM	now2s501	now2s502	redtmh now2	Modeling started
MS	91-12-20	4:49	PM	now2s501	now2s502	redtmh now2	Plan Modeling Save
MO	91-12-20	4:49	PM	now2s501	now2s502	redtmh now2	Changes saved
MO	91-12-20	4:50	PM	now2s501	now2s502	redtmh now2	Exited Modeling
MI	91-12-23	11:39	AM	now2s501	----------	redbdm now2	Modeling started
MS	91-12-23	11:50	AM	now[illegible]01	----------	redbdm now2	Plan Modeling Save
MO	91-12-23	11:50	AM	now2s501	----------	redbdm now2	Changes saved
MO	91-12-23	11:51	AM	now2s501	----------	redbdm now2	Exited Modeling
MI	91-12-23	11:51	AM	now2s501	----------	redbdm now2	Modeling started
MC	91-12-23	11:54	AM	now2s503	----------	redbdm now2	now 2s501 saved to now2s503
MC	91-12-23	11:55	AM	now2s501	----------	redbdm now2	now2s501 saved to now2s503

MO	91-12-23	11:56	AM	now2s501	----------	redbdm now2	Changes saved
MO	91-12-23	11:56	AM	now2s501	----------	redbdm now2	Exited Modeling

****

This is now plan >>> now2s503 <<< it was created from now2s501

****

ED	91-12-23	11:58	AM	now2s503	----------	redbdm now2	Description modified
MI	91-12-23	11:58	AM	now2s503	----------	redbdm now2	Modeling started
MO	91-12-23	12:02	PM	now2s503	----------	redbdm now2	Changes saved
MO	91-12-23	12:02	PM	now2s503	----------	redbdm now2	Exited Modeling
MI	91-12-23	12:03	PM	now2s503	----------	redbdm now2	Modeling started
MS	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Plan Modeling Save
MO	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Changes saved
MO	91-12-23	12:24	PM	now2s503	----------	redbdm now2	Exited Modeling
ED	91-12-23	12:26	PM	now2s503	----------	redbdm now2	Description modified
MO	91-12-21	6:25	PM	now1s508	now1s501	redrkb now1	Exited Modeling
MI	91-12-22	10:07	AM	now1s508	----------	redsds now1	Modeling started
MS	91-12-22	11:29	AM	now1s508	----------	redads now1	Plan Modeling Save
MO	91-12-22	11:29	AM	now1s508	----------	redads now1	Changes saved
MO	91-12-22	11:29	AM	now1s508	----------	redads now1	Exited Modeling
MI	91-12-23	5:52	PM	now1s508	----------	redrvh now1	Modeling started
MS	91-12-23	6:24	PM	now1s508	----------	redrvh now1	Plan Modeling Save
MO	91-12-23	6:24	PM	now1s508	----------	redrvh now1	Changes saved
MO	91-12-23	6:25	PM	now1s508	----------	redrvh now1	Exited Modeling

APPENDIX C

NO. 91-1270

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

ANN RICHARDS, Governor of Texas, et al.,

Appellants,

v.

LOUIS TERRAZAS, et al.,

Appellees.

AFFIDAVIT OF ALAN SCHOOLCRAFT

STATE OF TEXAS §
§
COUNTY OF BEXAR § ss.:

BEFORE ME, the undersigned Notary Public, personally appeared ALAN SCHOOLCRAFT, known to me to be the person whose signature is subscribed below, who, being by me duly sworn, on his oath deposed and stated as follows:

1. My name is Alan Schoolcraft. I am over the age of 21 years and fully competent and qualified to make this affidavit. I have personal knowledge of all of the facts stated in this affidavit and they are true and correct.

2. I am [a] member of the House of Representatives of the State of Texas, representing House District 121. I

have been a member of the House of Representatives since 1981.

3. I did not call or direct anyone else to call Judge James Nowlin or any other member of the three-judge federal panel or its personnel on December 23, 1991. I was not in my Austin legislative office on the 23rd at the time the phone call to the court allegedly was made. The telephone number from which the call to the court allegedly was made is on a telephone instrument located in a common area adjacent to my office.

4. I never have called or directed anyone else to call Judge Nowlin or any other member of the panel or its personnel regarding this case, and have never spoken with any of these persons regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting.

5. I never have asked any person to call or speak with Judge Nowlin or any other member of the panel or its personnel regarding this case, my plans to run for the Texas Senate, or any other aspect of redistricting, and know of no one who did so on [my] behalf. To my knowledge, no one has spoken with any of these persons on my behalf.

6. On Friday, February 14, 1992, I learned that the Attorney General of the State of Texas had obtained the telephone logs reflecting calls made from my legislative office in Austin. I did not authorize the Attorney General to obtain these records, and did not know he intended to obtain them. I never was asked about my telephone logs before I learned of the allegations made to the United States Supreme Court on Friday, February 14, 1992. I

never was asked whether the allegations were true before they were made to the Supreme Court.

7. On February 14, 1992, immediately after learning of the allegations, I contacted the Attorney General of the State of Texas and informed his office that I have had no contact or communications with the Austin court or any of its personnel concerning this case or redistricting.

8. I absolutely deny any suggestion that I communicated with Judge Nowlin directly or through anyone else, and I resent the implication that any of us would conduct ourselves in that manner.

9. My first knowledge of the existence and configuration of this Court's interim senate plan came after the plan was announced to the public on December 24, 1991. Before that time, I neither knew nor was informed what the boundaries of the senate district I am running for were to be or the district my home was placed in.

Further affiant sayeth not.

/s/ Alan Schoolcraft
ALAN SCHOOLCRAFT

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ day of February, 1992, to certify which witness my hand and official seal of office.

[SEAL]

IAN J. WELLBORN
Notary Public State of Texas
My Commission Expires 09/26/94

/s/ Ian J. Wellborn
Notary Public,
State of Texas

Ian J. Wellborn
Printed Name

Commission Expires: 9/26/94

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS TERRAZAS, et al., Plaintiffs, AND ROBERT A. ESTRADA, et al., Plaintiff/ Intervenors	§	CIVIL ACTION NO. A-91-CA-425
vs. BOB SLAGLE, et al., Defendants,	§	CIVIL ACTION NO. A-91-CA-426

AFFIDAVIT OF SENATOR DAVID SIBLEY

THE STATE OF TEXAS §
COUNTY OF McLENNAN §

Before me, the undersigned Notary Public; personally appeared DAVID M. SIBLEY, known to me to be the person whose signature is subscribed below, who being by me duly sworn, on his oath deposed and stated as follows:

1. My name is David M. Sibley. I am over the age of 21 years and fully competent and qualified to make this affidavit. I have personal knowledge of all of the facts stated in this affidavit and they are true and correct.

2. I am a member of the Senate of the State of Texas, representing Senate District 9. I was elected to the Texas Senate in a special election held in February of 1991.

3. In March 1990, I ran for the Republican nomination for election to the United States Congress from Texas' 11th Congressional District. During my primary campaign, I retained the services of Wordsmith Advertising & Video Production in Waco, Texas, for the production and publication of my television, radio, and newsprint publicity. My contract with Wordsmith ended after I lost the primary election. I have paid all of the fees charged by Wordsmith, which constituted my entire media budget. Most of the money paid to Wordsmith was used by the company to purchase television and radio air time and newspaper ads. The cost of the production of the ads was included in these fees. I assume a portion of the fees were kept as a commission, but I do not know the exact percentage retained.

4. Jack Smith also worked in the campaigns of Joe Barton for U.S. Congress and M. A. Taylor for Texas House of Representatives prior to and after my unsuccessful congressional campaign. Neither of these individuals received any relief from the interim plans ordered by the Federal Court.

5. In 1991, I ran for the Texas Senate. In that election, I retained Wordsmith for some limited consulting during December, 1990, and January and February, 1991, because he was familiar with many of the newspapers in my district due to his prior work for Congressman Joe Barton and Representative M. A. Taylor. Throughout

those months, my total payments to Wordsmith were approximately $5,800.00.

6. While I know Jack Smith, and used his services during my 1990 and 1991 campaigns, I absolutely deny any suggestion that I communicated with Judge Walter Smith through or to his brother Jack Smith, and I resent the implication that any of us would conduct ourselves in that manner.

7. I have not spoken to Judge Walter Smith about any aspect of this case at any time. In fact, the only words between Judge Smith and me since the advent of this litigation has been salutations in a hallway on one occasion in the presence of six to eight other people.

8. My first knowledge of the existence of this Court's interim senate plan came after the plan was announced to the public on December 24, 1991. Before that time, I neither knew nor was I informed by any person that the Court had drafted its own plan, much less what the boundaries of my district were to be.

9. The accusation in the motion to recuse Judge Smith filed by Bob Slagle that I "had prior knowledge of the nature of the senate boundaries contained within the three judge interim plan prior to the issuance of the Court's Order of December 24, 1992," is absolutely false.

Further affiant sayeth not.

/s/ David M. Sibley
DAVID M. SIBLEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30th day of January, 1992, to certify which witness my hand and official seal of office.

[SEAL]

KAY TRICE
NOTARY PUBLIC
STATE OF TEXAS
Commission
Expires 9-30-95

/s/ Kay Trice
Notary Public,
State of Texas

Kay Trice
Printed Name

Commission Expires: 9-30-95

APPENDIX E

U.S. Department of Justice
Civil Rights Division

SEAL

Office of the Assistant Attorney General

Washington, D.C. 20330

March 10, 1992

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to House Bill No. 2 (1992), which concerns the 1992 primary and general elections and provides for the consolidation of election precincts, nomination of candidates by political party executive committees in the event that a different redistricting plan for either house of the legislature is used for the general election than was used for the primary election, an alternative date for the state and presidential primary election, a candidate filing period for state Senate for such primary, and the rescheduling of deadlines and modification of procedures consistent with the alternative primary date, submitted to the Attorney General pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on January 10, 1992.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. With regard to the provision authorizing the consolidation of election precincts

for the 1992 primary and general elections only (H.B. 2, § 3), the Attorney General does not interpose any objection to the specified change. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). We also note that the provision for the consolidation of election precincts is viewed as enabling legislation. Therefore, any changes affecting voting, such as the actual consolidation of specific election precincts, which you or others may seek to implement pursuant to this Act would be subject to Section 5 review. See 28 C.F.R. 51.15.

Another provision of H.B. 2, Section 8, addresses the possibility that the 1992 general election for "either house of the legislature" may be held under a redistricting plan different than the plan used for the 1992 primary election. If that circumstance were to occur, Section 8 provides: "if a political party has no nominee for a particular office under the new plan, the political party's appropriate executive committee may nominate a candidate to appear on the general election ballot for that office." Because neither your submission nor the text of this provision explains fully the operation of this provision, we have sought informally to obtain such clarification from the state but have obtained no official, written clarification in response to our inquiries.

It appears that the legislation contemplates that there would not be a new primary election if the state obtained authorization for holding the 1992 general election under a redistricting plan other than the state House and state Senate plans used for today's primary election pursuant

to the orders of the three-judge federal court in *Terrazas v. Slagle*, Nos. 91-CA-425 and 426 (W.D. Tex. Dec. 24, 1991). Instead of a new primary, it appears that the political party nominee for the general election would be either the person chose in the primary from the comparable district under the court's plan or the person chosen by the party executive committee.

The state has not explained adequately why it would seek to deprive voters of the opportunity to select political party nominees in a new primary if a new redistricting plan for the state House or state Senate is authorized for use in the general election. The effect of such a decision on minority voting strength could be analyzed thoroughly in the context of a specific redistricting plan. The state, however, has chosen to seek Section 5 preclearance for Section 8 now, despite the contingent nature of the provision and regardless of the specific plan that may be involved.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained with regard to Section 8 of H.B. 2. Therefore, on behalf of the Attorney General, I must object to the voting changes effected by Section 8.

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted change effected by Section 8 from the United States District Court for the District of Columbia. The state also may request that the Attorney General reconsider the objection. Until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the provisions of Section 8 of H.B. 2 continue to be legally unenforceable. *Clark v. Roemer,* 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

Finally, the provisions of Sections 2, 5, 6 and 7 of H.B. 2 are, by their terms, contingent on the authorization for the state to use the legislatively enacted state Senate redistricting plan (*i.e.*, Senate Bill No. 1 (1992)) for the primary election. The state, however, has been ordered to hold primary elections on March 10, 1992, under the state Senate redistricting plan drawn by the court in *Terrazas v. Slagle,* No. 91-CA-426 (W.D. Tex.) and has been unsuccessful in its attempts to stay those orders or to obtain authorization to use the S.B. 1 redistricting plan. Nor has the state obtained the requisite preclearance under Section 5 for the S.B. 1 plan. Accordingly, no determination by the Attorney General is required or appropriate concerning these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25 and 51.35).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have

any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

No. 91-1546

In the Supreme Court of the United States

OCTOBER TERM, 1992

BOB SLAGLE, APPELLANT

v.

LOUIS TERRAZAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

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QUESTIONS PRESENTED

1. Whether a court-ordered interim redistricting plan for state legislative districts violates constitutional standards if it contains a total maximum population deviation of 9.98%.

2. Whether the court-ordered interim redistricting plan should be vacated because the conduct of one of the members of the three-judge district court allegedly created an appearance of impropriety.

3. Whether a court-ordered redistricting plan that is allegedly based primarily on a proposed plan submitted by a party to the litigation is subject to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

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STATEMENT

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Appellant Bob Slagle appeals from orders of a three-judge district court directing that primary elections for the Texas State Senate be held under a court-ordered redistricting plan. The United States previously filed a brief as amicus curiae in response to an invitation from the Court urging summary affirmance of an appeal filed by the State of Texas from the same orders. See Brief for the United States as Amicus Curiae in *Richards* v. *Terrazas*, No. 91-1270. On June 29, 1992, this Court summarily re-

jected the claims raised in that appeal. *Richards* v. *Terrazas*, 112 S. Ct. 3019 (1992).

This appeal raises three additional issues. Many of the facts underlying those issues are set out in our brief as amicus curiae in No. 91-1270. We add the following:

2. In response to the three-judge district court's request that the parties submit proposed interim redistricting plans for the Texas State Senate (J.S. App. 9a-10a), appellees Terrazas, Angelo, and Craddick (the Terrazas appellees) submitted a plan prepared by the Texas Fair Redistricting Committee (the "FAIR plan"). J.S. App. 4a. The State of Texas submitted a different redistricting plan for the state senate, known as the *Quiroz* plan. 91-1270 J.S. at 4. Also before the district court was the redistricting plan for the state senate that had been adopted by the state legislature in May 1991. That plan, known as S.B. 31, had never taken effect, because the State withdrew its submission of S.B. 31 to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. J.S. App. 8a-9a, 25a-26a.

In crafting its interim plan, the district court began with S.B. 31 and modified it in those areas of the State in which it found likely violations of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. J.S. App. 26a-34a. Those modifications, in turn, necessitated changes in districts that were not themselves found to be in likely violation of Section 2. J.S. App. 34a. Nonetheless, the district court stated that "every attempt was made to place as many counties in the interim districts in the same numbered district as they would have been under SB 31." *Id.* at 34a-35a. Moreover, the court noted that "fully half of the Senate

Districts [under its interim plan], namely those in West and East Texas, are substantially the same as under SB 31." *Id.* at 35a.

The interim plan ultimately adopted by the district court created state senatorial districts with a maximum population deviation of 9.98%. J.S. 9. The district court did not explain the reasons for that deviation, but did state that immediate issuance of its interim plan was required in order "to provide for the holding of elections in Texas without delay and in accordance with existing state law." J.S. App. 42a.

3. On July 1, 1991, appellant had filed a motion to recuse United States District Judge James R. Nowlin, one of the members of the three-judge district court, on the ground that Judge Nowlin's past political affiliations and his testimony ten years earlier in another redistricting case created an appearance of partiality. J.S. 3-4; Application for Stay, Appendix, Attachment E. That motion was denied on July 23, 1991. Mot. to Dis. 12.

Thereafter, on January 23, 1992—the same day on which appellant filed his notice of appeal to this Court—appellant filed a second motion to recuse Judge Nowlin, asserting for the first time that Judge Nowlin had improperly permitted State Representative George Pierce, a state senatorial primary candidate, to participate in drawing the court-ordered plan, thus creating an appearance of impropriety sufficient to require recusal. J.S. 3-4. Judge Nowlin denied that motion on February 5, 1992. *Id.* at 4; Application for Stay, Appendix, Attachment F, at 1-2.

Appellant then filed a motion on February 7, 1992, asking that the full three-judge district court review

Judge Nowlin's refusal to recuse himself. Judge Nowlin denied that motion as well. J.S. 4. Appellant did not file a notice of appeal from either of those orders.

On February 10, 1992, in response to a complaint against Judge Nowlin filed with the Fifth Circuit Judicial Council, the Chief Judge of the Fifth Circuit appointed a special committee of judges to investigate the complaint. On May 5, 1992, the special committee submitted its report to the Judicial Council, recommending that Judge Nowlin be reprimanded for creating an appearance of impropriety by permitting Representative Pierce to assist in revising the court's redistricting plan. See Motion for Establishment of Fifteen-Day Deadline for Submission of the Views of the United States in *Richards* v. *Terrazas*, No. 91-1270, Appendix. The Judicial Council adopted the committee's findings and recommendations and reprimanded Judge Nowlin on May 15, 1992.

Meanwhile, on April 1, 1992, appellant filed a petition for writ of mandate in the Fifth Circuit, asking that court to order the recusal of Judge Nowlin. On May 11, 1992, the Fifth Circuit certified to this Court the question whether it had jurisdiction to rule on the recusal petition during the pendency of appellant's appeal in this Court. By order dated June 1, 1992, this Court dismissed that certificate. *In re Slagle*, 112 S. Ct. 2296 (1992). As of September 1, 1992, the Fifth Circuit had not ruled on the petition for writ of mandate.

On July 21, 1992, Judge Nowlin *sua sponte* recused himself from further participation in this case. The Chief Judge of the Fifth Circuit immediately appointed United States District Judge Harry Lee

Hudspeth to serve as the third member of the district court panel assigned to this case.

4. On July 27, 1992, the United States District Court for the District of Columbia ruled that the redistricting plan adopted by the Texas Legislature for the state senate was entitled to be precleared under Section 5 of the Voting Rights Act. *Texas* v. *United States*, No. 91-2383 (D.D.C. July 27, 1992). On August 6, 1992, the Secretary of State of the State of Texas, John Hannah, Jr., issued a directive to state elections officers announcing that the 1992 general elections for the Texas Senate would be conducted pursuant to the newly precleared legislative plan, even though the primary elections had been conducted pursuant to the district court's interim plan. *Terrazas* v. *Slagle*, No. A-91-CA-426 (W.D. Tex. Aug. 21, 1992), slip op. 8-10. Appellees herein filed a motion with the district court to enjoin that directive. The district court granted that motion on August 21, 1992, ruling that the attempt to hold general elections for the state senate using districts different from those established by the court's interim plan (and utilized in the primary elections) violated both Section 5 of the Voting Rights Act and the court's previous orders. Slip op. 11-20.

DISCUSSION

1. Appellant contends (J.S. 9-14) that the district court's interim plan violates the one person, one vote requirement of the Fourteenth Amendment, because the 9.98% population deviation contained in the plan exceeds the "*de minimis* variation" permitted by this Court's decision in *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975). See also *Connor* v. *Finch*, 431 U.S.

407, 417-418 (1977). In our view, however, *Chapman* v. *Meier* and *Connor* v. *Finch* are inapposite, because they involved long-term redistricting plans adopted by district courts in the absence of the time constraints imposed by an impending election. In this case, by contrast, the district court was compelled to act promptly because of the State's inability to devise an acceptable redistricting plan and the rapid approach of the primary election season. As this Court has recognized, interim plans adopted shortly before elections must be judged under more lenient standards than those applicable in the usual case. See, *e.g.*, *Mahan* v. *Howell*, 410 U.S. 315, 332 (1973); see also *Connor* v. *Williams*, 404 U.S. 549, 550 (1972); *Watkins* v. *Mabus*, 771 F. Supp. 789 (S.D. Miss.), aff'd in part and vacated in part, 112 S. Ct. 412 (1991).

Even if the district court did err in devising its interim plan, moreover, it would in our view be far too late in the electoral process to remedy that error. Primary elections have been held under the court's plan, and the November 1992 general election is only weeks away. In similar cases of necessity, this Court has previously "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements." *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982); see, *e.g.*, *Kilgarlin* v. *Hill*, 386 U.S. 120, 121 (1967); *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964). Any injury to appellant from this result would be minor, because the court's interim plan will govern only the 1992 elections.[1]

[1] Moreover, it is unclear whether appellant has standing to raise this claim, because he does not allege that he resides in one of the senatorial districts with a substantially larger-than-average population. Cf. *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990).

2. Appellant seeks to challenge the district court's interim redistricting plan on the ground that Judge Nowlin should have recused himself from participation in this case. J.S. 15-26. Appellant's principal grounds for seeking recusal of Judge Nowlin, however—Representative Pierce's involvement in drawing the interim plan and Judge Nowlin's alleged *ex parte* communications with interested persons—had not been ruled on by the district court at the time appellant filed his notice of appeal in this case, and indeed had not even been raised in that court until the very day the notice of appeal was filed.[2] As a result, those claims are not properly before this Court.

As the Court observed in *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156 (1906), an interlocutory appeal contemplates "a review of the interlocutory order, and of that only. * * * The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered." 201 U.S. at 162. Thus, properly construed, appellant's notice of appeal brought before this Court only those matters that had been presented to and ruled on by the district court in issuing the interlocutory orders appealed from. Since appellant had given the district court no opportunity to rule upon his second recusal motion prior to filing

[2] Likewise, appellant's claims that Judge Nowlin's law clerk was previously employed by one of the plaintiffs and that Judge Nowlin improperly retained a private attorney to represent him at a deposition had not previously been submitted to the district court.

his notice of appeal, sound principles of appellate procedure dictate that this Court not address the issues raised in that motion for the first time on appeal. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, although the district court subsequently ruled on appellant's recusal motions, appellant chose not to appeal from those rulings, which have now become final and unreviewable.[3]

In any event, summary rejection of appellant's claims would be appropriate even if they were properly before this Court. Judge Nowlin has already recused himself from further participation in the

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[3] In his statement of questions presented, appellant asserts that an additional basis for recusal of Judge Nowlin is the fact that "the judge testified as an expert witness for Plaintiff Terrazas in a previous redistricting case" some ten years ago. J.S. i. That ground for recusal, unlike the other grounds asserted in the jurisdictional statement, was presented to the district court in appellant's first motion to recuse Judge Nowlin, which was denied prior to the entry of the orders appealed from here. Thus, that ground for recusal, unlike the remaining grounds asserted by appellant, is properly before this Court.

Appellant does not discuss the significance of Judge Nowlin's prior testimony in the body of his jurisdictional statement, however, except to note that his original recusal motion raising that issue was denied by the district court. J.S. 3. In the absence of any argument or explanation by appellant, it is impossible to conclude that Judge Nowlin erred in refusing to recuse himself merely because he had previously testified as a witness in a different case involving a different redistricting plan. See *United States* v. *Outler*, 659 F.2d 1306, 1311 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Winters* v. *Travia*, 495 F.2d 839, 841 (2d Cir. 1974); cf. *Laird* v. *Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., in chambers). Accordingly, this aspect of appellant's claim is clearly without merit.

case. Assuming *arguendo* the validity of appellant's second recusal motion, the question remains whether appellant would be entitled to the additional relief he seeks, namely, invalidation of the district court's interim redistricting plan.

As this Court made clear in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 848 (1988), a violation of 28 U.S.C. 455 does not automatically require that the challenged rulings be vacated. Rather, in determining whether to vacate the recused judge's prior orders, a reviewing court must consider the risk of injustice to the litigants and to third parties and the danger of "undermining the public's confidence in the judicial process." 486 U.S. at 864. Under that standard, appellant would not be entitled to relief in any event.

Primary elections were held under the district court's interim plan in March 1992, and the general election is now only two months away. If the interim plan were to be vacated at this point, substantial delay of the general election would likely be required while the State and the district court attempted to devise an acceptable plan for a new primary and general election at some later date. The inevitable voter confusion and disaffection caused by that delay would do far more to undermine the public's confidence in the judicial system, and would be far more unjust to the candidates who have already undergone a primary election and months of campaigning for the general election, than would a decision to leave the interim plan in place for the 1992 general election. The district court's interim plan will expire by its own terms at the end of the 1992 electoral season, and the State will then be free to

structure future elections in keeping with its legislatively approved plan. Accordingly, the interests of justice would not be served by vacating the district court's interim plan, and thus there is no need for this Court to consider the merits of appellant's claim that Judge Nowlin should have recused himself at an earlier stage of the proceedings.

3. Appellant contends (J.S. 26-32) that the district court's interim plan is essentially the same as the FAIR plan submitted by the Terrazas appellees, and that such litigant-sponsored plans may not be implemented by a court until they have been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. That contention does not warrant full briefing and argument.

a. Appellant asserts (J.S. 26) that the court plan "is, essentially, the FAIR plan." But the district court did not purport to adopt the FAIR plan. Rather, the court apparently drew its interim plan by modifying S.B. 31 in those areas of the State in which there were likely Section 2 violations and attempting to follow S.B. 31 elsewhere. J.S. App. 25a-26a, 34a-35a.

Appellant relies on the affidavit of Chris Sharman, Senior Redistricting Analyst for the Texas Senate Redistricting Committee, for the proposition that the FAIR plan and the court plan are essentially the same. See J.S. 26 (citing Application for Stay, Appendix, Attachment G). Nothing in that affidavit, however, indicates that the district court actually adopted the FAIR plan *in toto*. To the contrary, that affidavit makes clear that the court's plan incorporates only two districts from the FAIR plan. Application For Stay, Attachment G, ¶¶ 3-5. To be sure, the affidavit asserts that there are only "minor" differences between the two plans in some areas, and that in others the two plans are "very close." *Id.* at

¶ 3. But the affidavit also concedes that in many areas the court plan is only "loosely based" on the FAIR plan, and in others the two plans bear no resemblance to each other at all. *Id.* at ¶¶ 4-5. Thus, even accepting the affidavit at face value, it does not support the conclusion that the district court adopted the FAIR plan.

b. Even if the district court had adopted the FAIR plan, moreover, preclearance of the court's plan would not have been required. The preclearance requirement is triggered only when a "State or political subdivision" covered by Section 5 "enact[s] or seek[s] to administer" a change in election practices. 42 U.S.C. 1973c. Here, the State of Texas did not "enact or seek to administer" the FAIR plan. To the contrary, the State opposed its implementation. Thus, under the plain language of Section 5, preclearance of the FAIR plan was not required.

This Court's decision in *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), is not to the contrary. In that case, the Court reaffirmed the principle that "the [Section 5] preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." 452 U.S. at 138 (citing *Connor* v. *Johnson*, 402 U.S. 690 (1971) (per curiam)). At the same time, this Court concluded that a jurisdiction covered by Section 5 may not circumvent the preclearance requirement by seeking to have a federal court order its preferred redistricting plan into effect. 452 U.S. at 149-151. Accordingly, the Court held that preclearance is required "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people." *Id.* at 153.

The FAIR plan was not submitted by a covered jurisdiction; instead, it was submitted by individual

litigants before the district court. Moreover, the FAIR plan clearly does not reflect the policy choices of the State's elected representatives, because the State opposed implementation of that plan and instead submitted its own proposal. Thus, the court's plan is not subject to preclearance under the rule set forth in *McDaniel*.

The guidelines promulgated by the Department of Justice to govern the administrative preclearance process compel the same conclusion. The pertinent guideline provides that\"[c]hanges affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 *to the extent that they reflect the policy choices of the submitting authority*." 28 C.F.R. 51.18(a) (emphasis added).[4] Under that guideline, which "is entitled to considerable deference" (*NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 179 (1985)), it is apparent that the FAIR plan did not have to be precleared, because the FAIR plan was not submitted by the State and does not reflect the State's policy choices.

That conclusion fully comports with the underlying purpose of the preclearance requirement. Section 5 was enacted because some covered States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of

[4] The term "submitting authority" is defined to mean "the jurisdiction on whose behalf a submission is made," and the term "[c]overed jurisdiction" refers to "a State, where the [coverage] determination * * * has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis." 28 C.F.R. 51.2. The State of Texas is a covered jurisdiction. 40 Fed. Reg. 43,746 (1975).

adverse federal court decrees," and Congress "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights] Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Thus, the aim of Section 5 is fully achieved when preclearance review is required for changes in voting laws submitted by covered jurisdictions, and there is simply no justification for seeking to extend the preclearance requirement generally to remedies prescribed by federal courts to address adjudicated violations of federal law.

Relying on the Senate Report accompanying the 1975 extension of the Voting Rights Act, however, appellant argues (J.S. 27-28) that all litigant-sponsored plans are subject to Section 5 review. But recourse to legislative history is inappropriate here, because the statutory text is not ambiguous. See *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 & n.4 (1992); *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). As both this Court's decision in *McDaniel* v. *Sanchez* and the applicable Department of Justice guideline reflect, the plain language of Section 5 applies the preclearance requirement only to those litigant-sponsored plans that embody the policy choices of a State or political subdivision covered by Section 5. To the extent that the Senate Report may suggest otherwise, it misinterprets the reach of the statute.[5]

[5] Appellant suggests that *McDaniel* v. *Sanchez* supports his argument in this regard, because the Court's opinion in that case quoted the language from the Senate Report on which

Appellant argues more narrowly (J.S. 28-29) that the FAIR plan is subject to the preclearance requirement because it was submitted by a political party, an entity that can be considered a political subdivision of the State. For most purposes, however, political parties are private entities. And it is only in certain limited circumstances that their conduct may be viewed as that of a covered jurisdiction for purposes of Section 5 review: "[A] change affecting voting effected by a political party is subject to the preclearance requirement: (a) if the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction." 28 C.F.R. 51.7. Thus, "changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement." *Ibid.* On the other hand, "[c]hanges with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement." *Ibid.*

When a political party drafts a proposed redistricting plan for submission to a court, it is not acting under authority explicitly or implicitly granted by the State. Such a plan comes to the court with no official imprimatur, and the party submitting the

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he relies. J.S. 27-28 (quoting 452 U.S. at 148-149). The question whether Section 5 requires preclearance of plans submitted by litigants other than covered jurisdictions was not presented or discussed in *McDaniel* v. *Sanchez*, however, and thus that decision's reliance on the Senate Report does not resolve the question presented here. Cf. 452 U.S. at 141 (noting that dictum concerning an issue not presented in a case is not controlling in a subsequent case presenting that issue).

plan is in precisely the same position as any other private litigant. Accordingly, a political party's proposed redistricting plan is not subject to preclearance under Section 5.[6]

c. Appellant alternatively contends (J.S. 30-31) that the district court violated the rule of deference established in *Upham* v. *Seamon*, 456 U.S. 37 (1982), by deviating from S.B. 31 to a greater extent than was necessary to correct that plan's Section 2 violations. In our view, that issue is not "fairly included" within the questions presented by appellant in his jurisdictional statement. Sup. Ct. R. 14.1(a), 18.3; see J.S. i.

In any event, appellant's contention is without merit. The district court stated that it made every effort to follow S.B. 31 except as necessary to correct likely Section 2 violations, and appellant cites no evidence to the contrary. J.S. App. 34a-35a.[7] Moreover,

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[6] That conclusion is particularly inescapable when, as here, the covered jurisdiction actively opposes the implementation of the political party's plan. The result would be different, of course, if a covered jurisdiction itself instigated and participated in the development of a proposed redistricting plan and arranged for it to be submitted to the court by a political party or another nominally private litigant. There is no allegation to that effect in this case.

[7] Appellant contends that the district court erred in revising districts in which "likely," rather than actual, violations of Section 2 had been found. J.S. 30-31. What appellant ignores, however, is the fact that the district court's order granted *preliminary* relief pending a full trial on the merits. See J.S. App. 18a. "[A] preliminary injunction is customarily granted on the basis of * * * evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). Thus, a preliminary injunction may properly issue on a show-

in *Upham* v. *Seamon* the Court found error only in the district court's failure to adhere to those portions of the state-approved plan that had not provoked an objection from the Attorney General; here, by contrast, no part of S.B. 31 received Section 5 preclearance, and thus no judicial deference was due.

CONCLUSION

The orders of the district court should be summarily affirmed.

Respectfully submitted.

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SEPTEMBER 1992

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ing that the plaintiff "is *likely* to prevail on the merits," *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (emphasis added); a showing that the plaintiff will *actually* prevail is not required.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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STATE OFFICIALS' SUPPLEMENT TO APPELLANT'S JURISDICTIONAL STATEMENT, AND SUPPLEMENTAL APPENDIX

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September 4, 1992

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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STATE OFFICIALS' SUPPLEMENT TO APPELLANT SLAGLE'S JURISDICTIONAL STATEMENT

Pursuant to Court Rule 18.9, the Governor, Attorney General, and Secretary of State of Texas (collectively, "the state")[1] supplement appellant Slagle's jurisdictional statement. The purpose is to notify the Court of developments since the Court's summary affirmance on June 29, 1992, of the state's appeal, which are related to Question 2 of the questions presented in this appeal. Question 2 asks "[w]hether [detailed] actions of a district judge give rise to an appearance of impropriety sufficient to require reversal[.]"[2]

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[1] These three state officials appealed from the same January 10, 1992, stay denial as the appellant here. Their appeal, docketed as No. 91-1270, ended with the Court's summary affirmance in *Richards v. Terrazas*, 112 S.Ct. 3019 (1992). Under Rule 18.2, they are also parties to this appeal. The questions presented in the *Richards v. Terrazas* appeal were different than the questions presented here.

[2] The text of each item in the following summary is in the

1. On May 15, 1992, the nineteen-member Judicial Council of the United States Court of Appeals for the Fifth Circuit (with a recusal by Judge Garwood, a member of the three-judge district court) unanimously issued a public reprimand of Judge Nowlin for "his conduct" in crafting the court-ordered Senate plan which is before this Court in this appeal ("*Terrazas* interim plan"). The Council admonished Judge Nowlin "that his actions described in the report are ***inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges***[.]" 1a. (emphasis added). Canon 2a prohibits *ex parte* contacts, and Canon 3a(4) prohibits actions creating an appearance of impropriety.

2. The Council adopted the findings and conclusions of the five-member special committee which investigated a complaint filed against Judge Nowlin under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372. 3a-28a.[3]

3. On July 21, 1992, Judge Nowlin recused himself in this and two other redistricting cases involving the state. 29a-32a. The Chief Judge of the Fifth Circuit designated his replacement the same day. 33a.

4. On July 27, 1992, a three-judge panel of the United States District Court for the District of Columbia, in *Texas v. U.S.*, granted summary judgment for the state, preclearing under section 5 of the Voting Rights Act the state's legislatively-enacted senate redistricting plan,

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supplemental appendix accompanying this submission. All page references are to it unless otherwise indicated.

[3] The proceedings, including the evidence and statements upon which the report is based, are confidential and sealed, unavailable to the state and the public. *See* 28 U.S.C. § 372(c)(14). The Office of the Attorney General of Texas had made its own inquiry into the matter, issuing an Interim Report on Inquiry of Court-Ordered Senate Redistricting Plan on February 19, 1992. After reviewing it, the special committee "immediately arranged to take Judge Nowlin's sworn testimony." 5a.

commonly known as SB1. 34a-49a. Comparing SB1 with the *Terrazas* interim plan, the court found that SB1 "increases the number of districts in which minorities can elect candidates of their own choosing from eight to nine." 44a. The court adopted the affidavit of the state's expert, Mr. Moak, as its findings of fact. 45a. The Moak affidavit is reproduced at 50a-64a.

5. On August 21, 1992, the *Terrazas* three-judge district court issued an Order and Reasons in response to motions filed trying to stop the state's implementation of its precleared legislative plan, SB1, for the general election. 65a-85a. The court determined that its orders of December 24, 1991, and January 10, 1992 -- the ones before the Court in this appeal -- covered the state's 1992 general elections, too, even though the decretal parts of the two orders specifically use the word "primary" to describe the affected 1992 elections. 82a-84a. The *Terrazas* court then ordered the state "to carry out the 1992 Texas Senate general elections according to and utilizing the senate districts established in this Court's said December 24 and January 10 orders." 84a-85a. The August order rejects the argument made in the *appellees'* still-pending motion to dismiss this appeal for mootness because the appealed orders affected only the primaries. *See* Appellees' Motion to Dismiss or Affirm 4-7.[4]

As a result of the August 21st order, the state is enjoined from using its legislatively-enacted, precleared plan (which has been judicially-determined to offer

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[4] The identical appellees, as plaintiffs, used the identical language of the identical orders to successfully argue precisely the opposite proposition, which was adopted in the August 21st decision. The August 21st decision retroactively undermines the uncontradicted basis of the state's appeal in *Richards v. Terrazas*. *See* Juris. St., No. 91-1270, at 7 n.5 (filed February 5, 1992) (appealed order only affected primaries). Notwithstanding the clear admonition in Rule 15.1, the motion to affirm of the appellees in *Richards* (also, the appellees here) neither argued nor suggested that the court-crafted interim plan applies to the general election, too.

superior minority voting rights protection) and to use instead the inferior court plan whose crafting (the Council determined) created an appearance of impropriety by Judge Nowlin.

Respectfully submitted,

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September 4, 1992

SUPPLEMENTAL
APPENDIX

Before: Henry A. Politz, Chief Judge; Carolyn Dineen King, Will Garwood*, E. Grady Jolly, Patrick E. Higginbotham, John M. Duné, Jr., Jacques L. Wiener, Jr., Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, Jr., Circuit Judges; Morey L. Sear, John V. Parker, F. A. Little, Jr., Neal B. Biggers, Jr., Henry T. Wingate, Mary Lou Robinson, George P. Kazen, William Wayne Justice, and H. F. Garcia, District Judges.

Filed May 15, 1992

IN RE: The complaint of Lewis H. Earl against United States District Judge James R. Nowlin under the Judicial Conduct and Disability Act of 1980.

ORDER

After due consideration of the attached report of the investigative committee appointed in this matter, and the evidence upon which that report is based, the Council adopts the committee's findings and conclusions and approves and accepts its recommendation for the disposition of this complaint. For reasons stated in the report, the Council reprimands Judge Nowlin for his conduct. It further admonishes Judge Nowlin that his actions described in the report are inconsistent with the mandates of Canons 2A and 3A(4) of the Code of Conduct for United States Judges and are deemed prejudicial to the effective administration of the business of the courts. It is imperative that Judge Nowlin exercise greater care in such matters in the future and he is so directed.

FOR THE COUNCIL

s/s

Henry A. Politz
Chief Judge, Fifth Judicial Circuit

May 15, 1992

• Recused

UNITED STATES COURT OF APPEAL
Fifth Circuit

Date: May 5, 1992

To: The Fifth Circuit Judicial Council

Subject: Report of Special Committee of the Fifth Circuit Judicial Council on Complaint of Lewis H. Earl against Judge James R. Nowlin

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I. Background

Lewis H. Earl of Post, Texas, filed a complaint on January 21, 1992, with the Fifth Circuit Judicial Council against Judge James R. Nowlin. On February 5, 1992, Chief Judge Henry A. Politz dismissed the complaint. On February 10, however, the Chief Judge vacated his earlier order and directed that the complaint be investigated by a special Committee. As required by 28 U.S.C. § 372 (c) (4) (A), the Chief Judge appointed himself and an equal number of circuit and district judges to the Committee, appointing Circuit Judges W. Eugene Davis (Chairman) and Harold R. DeMoss, Jr.; and District Judges William Wayne Justice and George P. Kazen.

The charge against Judge Nowlin relates to his conduct while serving as a member of a three-judge district court empaneled to preside over consolidated lawsuits, bearing docket numbers A-91-CA425, 426, and 428, commonly referred to as the Terrazas litigation. The Terrazas plaintiffs seek to reapportion the Texas legislature

because of alleged violations of the Voting Rights Act and the Constitution.

The Terrazas suits were filed in May 1991 and were lodged in Judge Nowlin's division. At Judge Nowlin's request, then-Chief Judge Charles Clark empaneled a three-judge court and designated Circuit Judge Will Garwood and District Judge Walter Smith to sit with Judge Nowlin on the case. Judge Nowlin was the managing judge for the litigation. Following discovery and other pretrial activity, the court conducted a four-day preliminary injunction hearing during December 10-13, 1991. The three-judge panel issued a preliminary injunction on December 24, 1991, imposing an interim redistricting plan for the 1992 election.

Shortly after the preliminary injunction issued, the Attorney General of Texas and other unsuccessful litigants in the Terrazas litigation began to complain of misconduct by Judge Nowlin and his staff. The core of the complaint was that Judge Nowlin had consulted State Representative George Pierce and enlisted his assistance in drawing the court-ordered redistricting plan. Mr. Earl also complained of communication between Judge Nowlin and Chief Justice Phillips of the Texas Supreme Court. The complaints received extensive press coverage. A number of motions based upon these facts, including motions to recuse Judge Nowlin, were filed in the Terrazas litigation.[1]

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1 The motion to recuse was denied. An application for a writ of mandamus has been filed and is currently pending before a panel of the Fifth Circuit. The Committee expresses no opinion on the issue of recusal.

II. The Committee's Investigation

Shortly after the Chief Judge convened this Committee, the Texas Attorney General's office furnished us with copies of statements, depositions, and other exhibits it had obtained. After reviewing the investigative material and press clippings furnished us, the Committee immediately arranged to take Judge Nowlin's sworn testimony. All members of the Committee met in New Orleans and took Judge Nowlin's testimony on the morning of February 28.

We then arranged to take additional statements in Austin, Texas, on March 5, 1992. On that day, with all Committee members present, we took the sworn statements of the following witnesses: Britt Buchanan and J.D. Munn, law clerks to Judge Nowlin; Tina Hengst, computer operator at the Texas Legislative Council; Texas State Representative George Pierce; Michelle Bray, law clerk to Judge Garwood; Judge Will Garwood; and Judge Walter Smith. We also received a letter from Chief Justice Tom Phillips of the Texas Supreme Court in response to our inquiry about the circumstances surrounding this complaint.

III. The Facts

Based upon our investigation, we relate below the relevant facts that bear on the complaint against Judge Nowlin.

Judge Nowlin served in the Texas legislature for nearly 13 years prior to his appointment to the United States District Court in late 1981. While in the Texas legislature, Judge Nowlin represented a district in Bexar County that included the affluent towns of Alamo Heights and Terrell Hills, which are surround by the City of San

Antonio. When the Terrazas litigation was filed, Judge Nowlin learned from some of his acquaintances in the legislature that the Texas Legislative Council (TLC), an arm of the legislature, had acquired a sophisticated computer program that was very helpful in drawing district maps. In the weeks before the December 10 hearing, Judge Nowlin made arrangements for the three-judge court to have an account on TLC's computer system, called the RED.APPL (pronounced red apple) system. The RED.APPL's database contains extensive geographic and demographic information essential for redistricting. The three-judge court had two accounts on the RED.APPL system. These were called NOWL AND NOW2. Each of these accounts can be considered a separate file in which information, maps, or similar documents can be stored and then called up when needed. Maps and other data from three proposed redistricting plans were entered in these accounts: (1) the Senate plan adopted by the Texas legislature in the 1991 regular session (SB-31); (2) the plan proposed by the plaintiffs (plaintiffs' plan); and (3) the Quiroz plan, a plan proposed in a consent judgment of a Texas state court.

Three law clerks worked on the RED.APPL system: Britt Buchanan and J.D. Munn from Judge Nowlin's chambers, and Michelle Bray from Judge Garwood's chambers. Britt Buchanan was the clerk from Judge Nowlin's chambers with primary responsibility for working on the redistricting plan; J.D. Munn spent very little time working on it. Judge Nowlin instructed his clerks to work primarily with the plaintiffs' plan as a starting point and make modifications to that plan on the NOW2 account.

Judge Garwood instructed Ms. Bray to use the SB-31 legislative plan as a starting point and make modifications to that plan on the NOWL account.

Law clerks needing to work on the RED.APPL system were required to make an appointment with TLC for computer time. When they arrived at the appointed hour a computer operator met them in the lobby of the computer area. The operator used an entry card to gain entry to the computer rooms and the law clerk logged in. The law clerk and the operator would then enter the separate computer room. The law clerk would instruct the operator to enter the name of the account (i.e., NOWL or NOW2) upon which he or she desired to work. After the operator entered the account name, the operator would turn the keyboard to the law clerk who would then enter the password. Although the account name appeared on the screen, the password did not. Thus, no one could gain access to either account without the proper password, and only the court personnel allegedly knew the password.

Once the account name and password were entered, the law clerk was ready to work on the account. Most of the work related to maps, which were part of the plans proposed by the litigants. In working with these maps and changing district lines, the law clerk directed the operator to make a change in a district line by pointing to the map on the screen and directing the operator where to move the line. The operator would then, by use of a "mouse," move the district line until it was in the desired location. The relevant voter population and racial and ethnic information

would print out on the screen so that the clerk could see what results had been accomplished by the change.

Much of the work was by trial and error, and the law clerk would continue to make changes until the voting population figures reached the desired level. When a law clerk completed his or her work on the RED.APPL for the day, the operator ordinarily would print out a map showing the geographic location of the district lines. A separate printout showed the ethnic and racial voting population composition. The law clerk then took this printout back to chambers for consultation with the judge.

With this background, we now turn to the specific facts giving rise to the complaint.

A.

Representative George Pierce served with Judge Nowlin in the Texas House of Representatives from approximately 1979 until Judge Nowlin was appointed to the district court in 1981. The two were acquainted before that, however, because Pierce worked as a staff member to various legislative committees before 1979, while Nowlin was a representative. During the 1980-81 redistricting process, Rep. Pierce was actively involved in drafting various plans proposed at that time, and developed considerable skill and familiarity with the use of computers in the preparation of redistricting plans. Judge Nowlin knew of Rep. Pierce's skill and intense interest in the use of computers for this purpose; he considered Pierce a "computer nut". During the two years they were both members of the House, they did not serve on the same legislative committees. Although the two men were not

close friends and did not visit in each other's homes, they had some contact because they were both Republicans serving from the San Antonio area.

After Judge Nowlin was appointed to the district court, he had very little contact with Rep. Pierce before this redistricting suit was filed. After this suit was filed, Rep. Pierce first made contact with Judge Nowlin in late November 1991, after a Texas state court adopted a redistricting plan (the Quiroz plan). He called Judge Nowlin to complain about the state-ordered plan and to inquire about the federal action. Judge Nowlin told him that a hearing had been set for December.

During the course of their conversation, Rep. Pierce told Judge Nowlin that he was not going to seek re-election. Pierce told him that his combined years in the House and other state employment offered him a good retirement and that his wife wanted him to retire. Judge Nowlin understood from this conversation that Pierce was leaving political life. Judge Nowlin knew that one was not eligible to receive retirement benefits under the Texas retirement plan while holding public office in Texas.

The next conversation Rep. Pierce had with Judge Nowlin was shortly after the three-judge court hearing of December 10. It was common knowledge in the legislature that the court was drawing a plan on TLC's RED.APPL computer system. Pierce called Judge Nowlin to tell him that he did not think that the court's work product was secure on the RED.APPL system. He told Judge Nowlin that he believed TLC had the ability to gain access to the court's work in progress. A series of other minor contacts

followed. Rep. Pierce stopped by Judge Nowlin's office on one occasion, but Judge Nowlin was not there and did not see him. Rep. Pierce had intended to ask Judge Nowlin if an opinion was imminent. The next conversation was on Saturday, December 20, or Sunday, December 21. On this occasion, Judge Nowlin called Pierce to complain that Bob Kelly, the executive director of TLC, had failed to show up for an appointment. Judge Nowlin had scheduled a meeting with Mr. Kelly at the TLC office after Kelly proposed that TLC review the court's plan for technical errors, such as omission of a voting precinct. This failure of Mr. Kelly to maintain the appointment with Judge Nowlin increased Judge Nowlin's concern, prompting Judge Nowlin's call to Rep. Pierce to ask him to check on Kelly.

The next meeting between Rep. Pierce and Judge Nowlin, and the events related to that meeting, form the basis of the complaint at issue here. On the morning of December 23, Judge Nowlin and his staff were busily engaged in preparing a proposed draft opinion for the three-judge court. This included putting the final touches on the district lines of the plan Judge Nowlin planned to propose to his fellow judges. In making his final review of this Senate plan, he decided to move two affluent small cities, Alamo Heights and Terrell Hills, out of minority District 19 and put them in majority District 26. Judge Nowlin was familiar with these two towns because he had represented them in the Texas legislature.

Rep. Pierce stopped by Judge Nowlin's chambers around mid-morning on December 23 to report on his attempt to locate Mr. Kelly. After doing so, Judge Nowlin

discussed with Pierce the change he had decided to make in the Senate Districts 19 and 26. Judge Nowlin told Rep. Pierce that he wanted to move Alamo Heights and Terrell Hills from District 19 to District 26. Judge Nowlin testified that he also told Rep. Pierce that a loosely defined community known as Castle Hills would have to be moved from District 26 to District 19. According to Rep. Pierce, Judge Nowlin did not specify what areas he wanted moved out of District 26, nor did he mention Castle Hills. Judge Nowlin and Rep. Pierce did not discuss the location of the residences of any incumbents in the Texas legislature.

Judge Nowlin decided to send Rep. Pierce and one of the judge's law clerks to make the desired changes on the RED.APPL system. Britt Buchanan, Judge Nowlin's clerk most familiar with the redistricting case, was working on a draft of the proposed opinion. Judge Nowlin decided to send his second clerk, J.D. Munn, and called Mr. Munn into his chambers where he was speaking with Rep. Pierce. Judge Nowlin instructed Mr. Munn to accompany Rep. Pierce to TLC to make changes in Senate Districts 19 and 26 in Bexar County. Mr. Munn testified that he recalled hearing Judge Nowlin tell his co-clerk, Britt Buchanan, about a week earlier that he wanted to move some neighborhoods in San Antonio, and that he specifically heard Judge Nowlin mention Alamo Heights. Mr. Munn assumed that the changes the Judge had talked with Rep. Pierce about related to that earlier conversation. Although Mr. Munn was not informed as to the specific changes to be made, he thought that Judge Nowlin had told Rep. Pierce what changes to make.

Judge Nowlin testified that he sent Rep. Pierce with Mr. Munn because of Pierce's dual familiarity with computers and the communities around San Antonio. Mr. Munn was unfamiliar with the San Antonio area. Judge Nowlin felt that Rep. Pierce's help at TLC would speed up the process. Judge Nowlin instructed Mr. Munn to bring back to chambers for the court's review a map and printout of the changes he and Rep. Pierce made.

Mr. Munn proceeded to TLC with Rep. Pierce, as instructed. They gained access to the computer room in the usual way, as described above. Tina Hengst, one of the TLC operators, met them in the lobby and used her card to gain entry into the computer area. Mr. Munn then signed in on the log book. The computer operator entered the NOW2 account, as instructed by Munn. Mr. Munn then entered the password. After the operator pulled up the account, Mr. Munn made some changes in accordance with Judge Nowlin's instructions that were unrelated to the Bexar County changes under discussion here. Rep. Pierce had nothing to do with those changes.

After Mr. Munn finished these changes, he and Rep. Pierce changed positions so that Rep. Pierce could direct the computer operator. The operator, at Rep. Pierce's request, then zoomed in on Bexar County. Rep. Pierce proceeded to give instructions to Ms. Hengst. He showed Ms. Hengst on the map what areas to move out of District 19. This included generally the area within the city limits of Alamo Heights and Terrell Hills, plus some adjacent areas that were within the Alamo Heights Independent School District. He then instructed Ms. Hengst to move

Voting Tabulation Districts (VTDs) in District 26 that were closest to District 19 into District 19 to make up for the VTDs that had just been moved out of District 19. Castle Hills was one of the communities moved from District 26 to District 19. Rep. Pierce made two or three moves before he restored the total voting populations in the two districts to the required levels, and minority voting population in District 19 to the desired level. Rep. Pierce directed Ms. Hengst on the computer for approximately 20 to 30 minutes.

After these changes were made, Ms. Hengst gave Mr. Munn a printout of a map reflecting the districts as modified. She also gave him a printout of the new demographic statistical information. Mr. Munn took the map and additional information back to Judge Nowlin.

The changes Rep. Pierce and Mr. Munn made to Senate Districts 19 and 26 the morning of December 23 produced a slight increase in the percentage of Hispanic voting-age population in District 19, from 55.78% to 56.25%, and an increase in minority (black and Hispanic) voting-age population from 60.37% to 60.69%. The Pierce/Munn changes also resulted in a slight decrease, from 19.16% to 18.89%, in the percentage of minority voting-age population in District 26, which was already a majority Anglo district.

The only portion of the court's work product Rep. Pierce observed was the Senate districts in Bexar County located in the NOW2 account. The NOWL account was not displayed to Rep. Pierce. In making the changes to Districts 19 and 26, Rep. Pierce did not call up on the

computer screen the location of the residences of any incumbent members of the Texas Senate or House of Representatives.

During the afternoon of December 23, Judge Garwood and Judge Nowlin met to discuss the final opinion and court redistricting plan for the entire State. They conferred at length with Judge Smith on the telephone. The judges agreed to adopt the plan that had been drawn on the NOWL account with certain modifications to be made that afternoon. Among those modifications were the changes to Senate Districts 19 and 26 discussed above. Judges Garwood and Smith explained that the increase in minority voting population in District 19, the minority district, was their reason for approving the changes. Neither Judge Garwood nor Judge Smith had any knowledge that Rep. Pierce had played a role in making the changes in these two districts.

Shortly after 5:00 p.m. on December 23, Britt Buchanan and Michelle Bray went to the TLC office to make the final changes on the maps in the NOWL account. They attempted to duplicate in the NOWL account the changes Rep. Pierce and Mr. Munn had made to Senate Districts 19 and 26 in the NOW2 account earlier that day. Thus, except for minor errors the law clerks made in duplicating the NOWL map of Bexar County showing Senate district lines, the changes Rep. Pierce made, at Judge Nowlin's direction, in Districts 19 and 26 became part of the final plan adopted by the court.

Rep. Pierce formally announced on January 8, 1992, that he would seek election to the Senate from District 26.

Pierce designated his campaign treasurer with the Texas Secretary of State that same day. When Texas officials learned that Pierce had played a role in modifying Senate District 26 on December 23 and that he had announced his candidacy for this district, obvious inferences were drawn. The Attorney General of Texas and others concluded that Judge Nowlin allowed his former colleague to draw himself a safe Senate district.

B.

In evaluating Judge Nowlin's conduct, one of the central questions that concerns us is whether Judge Nowlin knew or suspected on December 23, 1991, that Rep. Pierce was considering running for a legislative office, particularly a seat in the Senate from District 26.

As stated above, Judge Nowlin, in his testimony to us, asserted that Rep. Pierce told him in late November 1991 that he intended to retire from the legislature. According to Judge Nowlin, Pierce told him that he was eligible for retirement and that his wife had insisted that he retire.

Rep. Pierce, in his sworn statement to this Committee, confirmed this discussion with Judge Nowlin. He asserted that in his conversation with Judge Nowlin in late November 1991, he told Judge Nowlin that he was not going to run again. Rep. Pierce told Judge Nowlin that he was eligible for a good retirement, and his wife wanted him to retire. According to Pierce, this would have made it plain to Judge Nowlin that he did not intend to run for any legislative office because everyone familiar with the system knows that one must be out of office to be eligible for

retirement. Rep. Pierce told us further that he had no reason to believe that Judge Nowlin had any knowledge before December 1991 of any plans he might have had to run for the Senate. This statement may be read as contradictory to a statement Pierce made in his February 3, 1992, deposition taken by the Texas Attorney General in connection with the Terrazas litigation. Rep. Pierce testified as follows in that deposition:

> Q: Would it be possible that Judge Nowlin would have been aware of your interest in a Senate race within the last six months?
>
> A: Sure. Let's face it, we are friends . . .
>
> Q: So it's your belief that he would have been aware of your interest in seeking a Senate race within the last six months?
>
> A: Sure, it's been in the newspapers. It's been in publications. It's been put out everywhere.

We questioned Rep. Pierce about this apparent inconsistency. He testified that he understood the question in the deposition to address Judge Nowlin's knowledge of his interest in the Senate seat within the six-month period preceding his February deposition. Rep. Pierce stated to us that when he answered the question in the deposition, he was thinking of knowledge Judge Nowlin obviously acquired from extensive press coverage in January and February 1992 about this incident. In other words, Rep. Pierce stated that he was addressing his impression of Judge Nowlin's knowledge during the weeks preceding the

February 3 deposition and not during November and December 1991.

The Texas Attorney General points to an earlier reference by Pierce in his deposition that he had begun to formulate an interest in running for the Senate about a year before his deposition was given. Rep. Pierce explained to us, however, that while he indeed had expressed interest in running for the Senate in early 1991, he later changed his mind.

We also questioned Rep. Pierce about what ultimately made him decide to run for the Senate from District 26. He stated that when it became apparent to him that the only candidate for the Senate seat from Bexar County was Alan Schoolcraft, he decided to run. This fact was critical to his decision because of his impression that Alan Schoolcraft was not a strong candidate. Rep. Pierce concluded that if he did not run, the District 26 senator would come from one of the counties north of Bexar County, and he did not want to see Bexar County lose this Senate seat.

The Fifth Circuit librarian, at our request, investigated whether any newspaper articles appeared in Austin or San Antonio before December 23, 1991, concerning Rep. Pierce's plans to run for the Senate. She found no articles in any Austin newspaper. She did find articles in the San Antonio Light in May, June and December 1991 discussing the possibility that Pierce would run for the Senate.

Judge Nowlin does not subscribe to or regularly read a San Antonio newspaper. We find no reason to believe

that Judge Nowlin had knowledge of the articles in the San Antonio Light suggesting that Pierce might run for the Senate. We also find no reason to discredit Judge Nowlin's statement that Rep. Pierce told him in unequivocal terms that he had no plans to run for any legislative office. Rep. Pierce's sworn statement to our Committee on this point fully confirms Judge Nowlin's testimony. Rep. Pierce's explanation of his arguably inconsistent prior testimony is not implausible. The prior testimony was in response to a questions inviting Rep. Pierce to speculate about Judge Nowlin's knowledge, and the question was ambiguous with respect to the time frame in which Judge Nowlin's knowledge was to be evaluated. We conclude that, whatever Pierce's actual political intentions may have been in December 1991, Judge Nowlin did not regard Pierce as a candidate for the state Senate at that time.

Moreover, the evidence clearly establishes that the changes to District 19 and 26 were initiated by Judge Nowlin, not by Rep. Pierce. Judge Nowlin was intimately familiar with Terrell Hills and Alamo Heights. He neither needed nor sought input from Pierce on whether those two entities had more in common with District 19 or 26. Judge Nowlin felt some loyalty toward the two towns because he had represented them in the legislature. Judge Nowlin believed, correctly, that by transferring these two towns to District 26, he could place those entities in a District of what he perceived to be more common interests, and simultaneously increase the minority voting population in District 19.

The evidence further reflects that in agreeing to implement Judge Nowlin's instructions, Rep. Pierce was not enhancing his own electability. Pierce testified persuasively that Senate District 26, as finally drawn, was not a district from which he could easily win.[2] Alan Schoolcraft, a potential District 26 candidate, had represented Alamo Heights and Terrell Hills for some time in the Texas House of Representatives. On the other hand, Rep. Pierce's core supporters came from the Castle Hills area, which he took out of District 26 and put into District 19. Indeed, one of the documents that tracked the changes Rep. Pierce directed on December 23 demonstrates that Rep. Pierce moved more VTDs from Castle Hills that were necessary. The computer-generated tracking device shows that, after the populations of District 19 and 26 were within 5% of the desired level (which is all that is required), additional voting precincts were shifted out of District 26 into District 19. When we examined the historical voting patters of the VTDs Rep. Pierce moved out of District 26, particularly those he moved unnecessarily, the records indicated that those voters strongly supported Rep. Pierce.

C.

Although the above charge is the central one made against Judge Nowlin, Mr. Earl and the Attorney General of Texas make three additional, somewhat related charges that require discussion.

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2 Although we do not discount the political damage to Rep. Pierce from the extensive publicity surrounding these changes, we observe that later events bore out his pessimism. In the March 1992 primary, Rep. Pierce ran-fourth in a five-person race, garnering 8% of the vote.

First, the complainants charge that Rep. Pierce and a number of other members of the Texas legislature made multiple telephone calls to Judge Nowlin. This is supported by computer records that automatically document each call made from legislative offices in Austin. The computer record shows both the calling number and the number called, as well as the approximate length of the call. The record does not, however, identify either the person who originated the call nor the person who answered the call. The relevant records reflect approximately 22 calls from Rep. Pierce's office to Judge Nowlin's chamber. Almost all of these calls are shown as lasting two to three minutes. In addition to these calls, the records reflect a large number of calls in the two-to-three minute range from twelve other state legislators. We note initially that the telephone call recorder registers all calls made, not just completed calls, and that its minimum register is two minutes, even if a call actually lasts only a few seconds.

Our investigation revealed that Judge Nowlin seldom personally answers the telephones in his chambers. The telephone is answered either by the secretary, a law clerk, or an answering machine. Frequently, when Judge Nowlin and his staff are busy, they activate the answering machine. Rep. Pierce's calls to Judge Nowlin that exceed two or three minutes are accounted for and are discussed above. The law clerks, as well as Judge Nowlin, testified that while the redistricting suit was in progress, his office received multiple calls daily from members of the public including members of the state legislature seeking a progress report on the suit. The caller typically was

interested in knowing the date the court would reach a decision. Some of these calls were taken on the answering machine and the caller spoke with no one. On other occasions, the caller spoke with the secretary or a law clerk. From the evidence and our independent knowledge of the acute interest the public holds for litigation of this type, we have no reason to doubt this explanation for the multiple calls made from legislative offices to Judge Nowlin's chambers. We therefore draw no interferences of impropriety by Judge Nowlin from this evidence.

Mr. Earl, and some reports from the press, also complain about contact between Judge Nowlin and Chief Justice Tom Phillips of the Texas Supreme court. Judge Nowlin and Chief Justice Phillips have given the Committee a consistent, plausible explanation for this contact. The Texas Supreme Court had before it a writ application seeking review of the state district court consent judgment that imposed the Quiroz plan. On December 3, 1991, Chief Justice Phillips contacted Judge Nowlin and asked Judge Nowlin to postpone commencement of his hearing until the afternoon of December 10 so that counsel could appear before the Texas Supreme Court for argument of that appeal. Judge Nowlin, Judge Garwood, and Judge Smith discussed the effect of the state court judgment and whether they should wait until the Texas Supreme Court reviewed the Texas District Court order before proceeding with the suit pending before the three-judge court. Later, Judge Nowlin contacted Chief Justice Phillips to inquire whether the Supreme Court had issued a decision on its review of the Quiroz plan. On December 17, 1991, Chief

Justice Phillips called Judge Nowlin immediately after the Texas Supreme Court released its opinion.

We find no impropriety in the contacts between Judge Nowlin and Chief Justice Phillips. The conversations did not relate to the merits of the litigation. Rather, they were for the purpose of coordinating hearings in the related litigation and learning when the Texas Supreme Court issued its opinion.

D.

Finally, the Attorney General and the press have suggested that Judge Nowlin permitted Rep. Pierce to alter District 26 to place the residences of some of his potential opponents for the Senate seat outside of District 26. These potential opponents include Cyndi Krier, Jeff Wentworth, and Alan Schoolcraft.

We not initially that residence inside a senatorial district is not a requirement for eligibility to run in that district under the court's redistricting plan. Rather, candidates may run for any district regardless of their place of residence. Nevertheless, living outside the district in which a candidate runs can be an obvious political liability.

We are persuaded from the evidence that Judge Nowlin had no intention to move any of these potential Senate candidates' residences outside any particular district. Judge Nowlin and Rep. Pierce did not discuss the location of residence of any incumbents. The law clerks who did most of the work on the computer testified that they had no knowledge of the location of the residences of any of these potential candidates. They also denied receiving any instructions from Judge Nowlin to fix the lines

in such a way as to place the residences of these candidates either in or out of any particular district.

Rep. Pierce also denied considering the residences of any of these potential candidates when he moved the lines for District 19 and 26. Pierce's changes apparently moved Jeff Wentworth and Cyndi Krier's residences from District 26 to District 19. Their residences were near the District 19 line and Castle Hills. Once Castle Hills was moved into District 19, their residences would have logically moved into District 19. In other words, Rep. Pierce simply moved adjacent VTDs from District 26 into District 19; no apparent irregularity is presented about which VTDs were moved from District 26 to District 19. We reiterate that the locations of incumbents' residences were not displayed to Rep. Pierce on the RED.APPL system on December 23.

Alan Schoolcraft's home was in the northeastern corner of Bexar County. A single VTD, which included his residence, was moved from District 24 into District 26. We draw no negative inference from this isolated change, however, for two reasons. First, Rep. Pierce was not involved with this decision. As we interpret the testimony and the computer records, this change was made around 5:00 p.m. on December 23 by Britt Buchanan, who apparently was trying to increase minority representation in District 24. Second, the change in Mr. Schoolcraft's VTD placed his residence inside of District 26, it having been in District 24 in previous maps. Obviously, it would have been against Rep. Pierce's interest to move a potential rival into the District from which Pierce intended to run.

We find no merit, therefore, to the complaints that are predicated on these three latter grounds. We do, however, find substance to the first complaint discussed above, which we analyze below.

III. CONCLUSION AND RECOMMENDATION

The Judicial Council must determine whether Judge Nowlin "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372 (c) (1). We believe it may be helpful to consider first some of the charges leveled against Judge Nowlin that have not been established. We find no evidence that Judge Nowlin had a corrupt or evil motive in asking Rep. Pierce to assist in altering the court's redistricting plan. As indicated above, we do not believed that Judge Nowlin knew in December 1991 that Rep. Pierce planned to run for a legislative seat in 1992. Moreover, Judge Nowlin did not intend to allow Rep. Pierce to draw himself a favorable Senate district from which to run. We conclude that Judge Nowlin was rushing to get his proposed opinion in final form to present to his fellow panel members later that day so that it could be released before Christmas. He had confidence in Rep. Pierce, who was very knowledgeable about computer redistricting and about the geography of Bexar County. It would have taken Mr. Munn and Ms. Hengst, acting alone, much longer -- perhaps several hours -- to accomplish the same changes Rep. Pierce was able to complete in thirty minutes. The use of Rep. Pierce allowed Judge Nowlin to obtain the map of the new Districts 19 and 26, along with the statistical information, in time for his meeting with his fellow judges on the afternoon of

December 23. We also find that Rep. Pierce's involvement was limited to Districts 19 and 26 and that he had no input of any kind with respect to any other part of the redistricting plan in any other part of the State.

We are persuaded, however, that Judge Nowlin made a serious mistake in judgment when he asked Rep. Pierce to assist in making changes in a portion of the court's redistricting plan. Although Judge Nowlin reviewed and approved the changes Rep. Pierce made, Pierce, unfortunately, enjoyed latitude in deciding precisely what areas to move in the two Districts. Judge Nowlin gave no instructions to his law clerk, J.D. Munn, as to what changes should be made to Bexar County. Although Judge Nowlin's instructions to Rep. Pierce were general in nature, Pierce understood what Nowlin wanted him to do: move Alamo Heights and Terrell Hills from District 19 to District 26 and compensate District 19 by moving the adjacent areas of then District 26 (primarily Castle Hills) from District 26 into District 19. Both Judge Nowlin and Rep. Pierce must have realized that Pierce would need to engage in some trial and error exercises to accomplish this switch. This was the only way Rep. Pierce could achieve the required total population levels in the two districts and at the same time increase the minority voting population in District 19.

Judge Nowlin's conduct was inconsistent with the limitation of Judicial Canon 3A(4)[3] that prohibits ex parte

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3 Canon 3A. Adjudicative Responsibilities

communication with a party interested in pending litigation. Rep. Pierce obviously was someone with a potential and, as it developed, actual legal interest in the proceeding. Even if Rep. Pierce could have been considered a "disinterested expert," Judge Nowlin did not disclose his contact with Pierce to the parties, as required by Canon 3A(4). We stress that the "communication" between Judge Nowlin and Rep. Pierce was not the kind one normally contemplates in connection with this Canon. As we have previously indicated, there is no evidence that Judge Nowlin solicited or received any advice, as such, from Rep. Pierce with respect to the redistricting. We have also previously noted that the initiative for moving Alamo Heights and Terrell Hills came from Judge Nowlin, who requested Rep. Pierce to implement this change in much the same way that he might have instructed a law clerk. Nevertheless, we have also concluded that Rep. Pierce was afforded discretion in carrying out his charge, particularly with respect to compensating District 19 for the areas to be moved out. The end result of Rep. Pierce's efforts were then printed and thereafter "communicated" to Judge Nowlin via Mr. Munn.

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(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

This "communication" was then considered by Judge Nowlin and essentially incorporated into the final plan.

Judge Nowlin's conduct was also inconsistent with the admonitions of Canon 2A, which constrains a judge to avoid not just impropriety but also the "appearance of impropriety" in order to avoid erosion of public confidence through "irresponsible conduct by judges." Judge Nowlin should have realized that allowing Rep. Pierce to participate in drawing district lines would give a serious perception of impropriety. As a member of the legislative body being redistricted, Rep. Pierce had a keen interest in the process. Although Judge Nowlin was convinced that Rep. Pierce had no intention of being a candidate, Judge Nowlin had no way of knowing what rewards or punishments Pierce may have wanted to heap on his associates. The entire redistricting issue had generated intense partisan interest by December 23, 1991, as was inevitable. For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would clearly have the appearance of impropriety for any reasonable observer.

Judge Nowlin and his family have unfortunately suffered considerably from the public accusation of corruption and evil motive. As noted above, we find no foundation for these charges. We do conclude, however, that Judge Nowlin's unthinking ex parte contact with Rep. Pierce and allowing Rep. Pierce to play a role in this sensitive redistricting case amounts to conduct inconsistent with Canons 2A and 3A(4) and prejudicial to the effective administration of the business of the courts in violation of

28 U.S.C. § 372(c)(1). For these reasons, we recommend that the Council reprimand Judge Nowlin for his conduct and caution him to exercise greater care in such matters in the future.

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Harold R. DeMoss, Jr.
Judge William Wayne Justice
Judge George P. Kazen

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed July 21, 1992 at 1:34 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

ORDER

Judge James R. Nowlin hereby gives notice to the Chief Judge of the Fifth Circuit and all parties properly before the Three Judge Panel in the above numbered and styled causes that said Judge hereby sua sponte withdraws from further participation in the instant litigation. Although various allegations made by several parties in these cases have been widely publicized due to the highly partisan nature of the controversies and issues in said cases, this Judge has found no legitimate reason to recuse himself. Indeed, this Judge, despite considerable personal discomfort from publicized unfounded allegations, has maintained his participation in these cases primarily to discourage any precedent that would give credence to such charges or to set the stage in future litigation of whatever kind for dissatisfied or disgruntled parties to successfully remove a Judge from a case simply by efforts at creating

widespread controversy through out of court use of the media. This Judge is now concerned that because of the publicized negative personal comments made by several parties or their attorneys related to his participation in these matters a reasonable person might well conclude that the targeted Judge would maintain such bias and prejudice toward those parties or their attorneys making the comments or generating publicity that he could not henceforth be fair and impartial in considering future issues that might come before the Panel. This Judge has no animosity toward any party in these causes because of their conduct either in or out of court; nevertheless, a reasonable person knowing no more about these causes or publicity therein than what has over the past four months appeared in print or on the broadcast media might well assume some degree of manufactured bias.

It is of utmost importance that during the remainder of this litigation Panel members be unfettered in their ability to impose appropriate penalties and sanctions against attorneys or parties who conduct themselves in violation of the Rules. Imposition of Rule 11 sanctions for harassment, the filing of frivolous pleadings or penalties for other unprofessional conduct or behavior should be readily available to the Court. Proper administration of these elementary rules of conduct in the last days of these cases can best be achieved through the addition of a new Panel member whose actions could not be subject to the unjustified yet certain claim of retribution for the excesses of the past.

Additionally, the duties and obligations of serving as a Judge in this litigation as well as inquiries about generated publicity have hampered the orderly disposition of the Court's substantial pending criminal and civil dockets. The Supreme Court of the United States unanimously affirmed the Judgment of the Three Judge Panel on June 29, 1992. Richards, Gov. of Texas v. Terrazas, Louis, et al., No. 91-1270, 1992 U.S. LEXIS 4538, at *1 (U.S. June 29, 1992). As a Judge who takes pride in his past participation in the creation of interim relief that complies with the mandates of the Voting Rights Act, I leave the supervision of the remaining issues to another judge with determinations, patience, a less pressing docket, and fewer emergency obligations.

Already too much energy and effort have been expended in these cases on quests for protection or enhancement of partisan and personal interests. Scarce public funds have been utilized to vindicate ambition and the preservation of political power, all fleeting over time. Some involved must at some future time answer for their actions and motives to professional peers or at the ballot box. All of us will eventually be required to respond to an even higher Authority. The actions that this Judge has taken in these cases in an effort to apply the law to the facts presented leave him with a clear conscience at that final and most important roll call.

Although 28 U.S.C. § 2284(b)(1) provides that the district judge to whom the request for a three judge panel was presented shall serve as a member of the panel, this

requirement is not jurisdictional. See Hicks v. Miranda, 442 U.S. 332, 338 n.5 (1975).

28 U.S.C. § § 291(b), and 292(b) allow the Chief Judge of the Circuit to designate another circuit or district judge to hold Court within the circuit. 28 U.S.C. § 295 mandates that no designation or assignment of a circuit or district judge shall be made without the consent of the Chief Judge or judicial council or the circuit from which the judge is to be designated and assigned.

IT IS THEREFORE ORDERED that the Clerk of the Court shall send a copy of this Order to the Chief Judge of the Fifth Circuit as notice of the contents herein, so that another Judge may be designated to replace Judge Nowlin on the panel in the instant litigation.

SIGNED AND ENTERED this 21st day of July, 1992.

s/s
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Filed July 21, 1992 at 4:21 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-425
	§	CIVIL NO. A-91-CA-426
BOB SLAGLE, et al.	§	CIVIL NO. A-91-CA-428

ORDER

Having been advised that District Judge James R. Nowlin has this date formally withdrawn from further participation as a member of the three-judge court assigned to this litigation, as Chief Judge of the United States Court of Appeals for the Fifth Circuit I hereby designate and appoint Harry Lee Hudspeth, United States District Judge of the Western District of Texas, to replace Judge Nowlin and to assume all duties and responsibilities heretofore performed by Judge Nowlin on this court. The assignment is effective immediately.

Shreveport, Louisiana, this 21st day of July, 1992.

s/s
HENRY A. POLITZ
CHIEF JUDGE
UNITED STATES FIFTH CIRCUIT
COURT OF APPEALS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 27, 1992.

STATE OF TEXAS, et al.,	§	
	§	
vs.	§	Civil No. 91-2383
	§	(Stanley Sporkin)
UNITED STATES OF	§	
AMERICAN et al.	§	

MEMORANDUM OPINION

The State of Texas filed this suit seeking relief under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988) ("section 5"). It originally asked this Court to preclear four of its newly enacted reapportionment plans. Questions involving preclearance for the plans governing elections to the Texas House, the Texas Board of Education and the United States Congress have since been resolved. Only the reapportionment plan for the Texas Senate remains at issue.

Reapportionment for the Texas Senate has been the subject of extensive litigation in both state and federal courts. See Texas v. United States, 785 F. Supp. 201, 202-203 (D.D.C. 1992). Several plans have been proposed or adopted by the legislature and the courts in the course of these law suits; however, this Court has previously determined that only two are relevant to this case. The first

is the plan that Texas is asking this Court to preclear: SB 1 which was enacted by a special session of the state legislature on January 8, 1992. The second is the plan that will serve as the benchmark for a section 5 preclearance analysis: the "Terrazas" plan which was ordered into effect for the primary elections by a three-judge federal court in Texas on December 24, 1991. See id.

On July 10, 1992, the State of Texas filed a motion for summary judgment asking the Court to declare SB 1 precleared. It also filed a motion to reconsider the order granting permissive intervention to Louis Terrazas, Tom Craddick, Ernest Angelo, and Robert A. Estrada ("Terrazas intervenors")[1] and a motion for judgment on the pleadings. The Terrazas intervenors simultaneously filed their own motion for summary judgment asking the Court to declare that SB 1 is not entitled to preclearance. Responses were filed on July 24, 1992. The Court has considered the

1 On March 19, 1992, the Court issued an order permitting two sets of individuals to intervene in the case pursuant to Fed. R. Civ. P. 24(b) "subject to further order of this Court." Texas v. United States, Civ. No. 91-2383, Order (Mar. 19, 1992). Austin Negrete and eight other individuals ("Negrete intervenors") comprise the first set. They favor preclearance of SB 1. The Terrazas intervenors are the second set. They oppose preclearance of SB 1.

The State of Texas has filed a motion to reconsider the Rule 24(b) intervention for the Terrazas intervenors. As noted by the United States, the Terrazas intervenors have only raised an issue of law in their motion for summary judgment and in their opposition to Texas's motion for summary judgment. Memorandum of the United States in Response to Plaintiff's Motion for Reconsideration of Rule 24(b) Intervention Order and for Judgment on the Pleadings, 1-2. Hence, their continued presence in the case will not result in any undue delay in reaching a final adjudication on the merits. Texas's motion to reconsider the intervention will be denied.

arguments of all the parties and is now prepared to rule on the motions.

I. SUMMARY JUDGMENT

Summary judgment may be granted where the Court finds that there is no genuine issue of material fact left to be resolved. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Fed. R. Civ. P. 56(c). Neither the moving party nor the opponent is required to submit affidavits or to point to other materials in the case to demonstrate that no genuine issue of material fact exists. However, a summary judgment motion may not be opposed by "the mere pleadings themselves." Celotex Corp., 477 U.S. at 324.

All parties agree, with one exception,[2] that there is no genuine issue of material fact in dispute in this case. See Responses of Defendant-Intervenors Louis Terrazas, et al. to Motions of Plaintiff State of Texas, 9; Defendant-Intervenor Negrete's Response to Plaintiff's Motion for Summary Judgment, 3; Memorandum of the United States in Response to Plaintiff's Motion for Summary Judgment, 1-2; Texas's Opposition to Terrazas Intervenors' Motion for Summary Judgment, 1 n. 2. However, they disagree over the relevance of particular facts. The Terrazas intervenors have not submitted any supporting materials in conjunction with their motion for summary judgment nor have they filed a statement of material facts which are not

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2 The State of Texas opposes the summary judgment motion of the Terrazas intervenors on the grounds that there is a material question of fact on the issue of whether SB 1 violates section 2. We disagree with the State that an issue of fact is raised; rather we see it as an issue of law whether the Texas court's decision established that SB 1 is a violation of section 2 at all. This will be discussed infra at 5-11.

in issue as required by the local rules of this Court. See Local Rule 108(h). Instead, the Terrazas intervenors merely state in their motion, "There is no genuine issue of material fact necessary to establish that SB 1 is not entitled to section 5 preclearance." They also oppose the State of Texas' motion for summary judgment on purely legal grounds. The Terrazas intervenors have staked their position entirely on the legal claim that this Court is bound by a statement of the three-judge court in Terrazas v. Slagle, Nos. 91-425, 91-426 (W.D. Tex., Jan. 10, 1992) declaring SB 1 in violation of section 2 of the Voting Rights Act. In sum, they argue that facts pertaining to the relative merits of SB 1 and the Terrazas plan are not material because the Court is legally compelled to conclude that SB 1 cannot meet the standards for preclearance.

The State of Texas does believe that there are material facts which must be found in order to grant judgment in its favor, but it believes those facts are not in dispute. In support of its motion for summary judgment, the State of Texas has submitted affidavits from experts attesting to the ability of their plan to meet the standards for section 5 preclearance. The United States has filed papers stating that it does not oppose Texas' motion for summary judgment; the Negrete intervenors have filed in support of it. No party has filed any affidavits or pointed to any interrogatories, documents or other factual items in the record to contest Texas' statement of facts. The Court will address both motions simultaneously because they present the same legal questions.

A. Legal Significance of the Statement by the Terrazas Court

On January 10, 1992, the Terrazas three-judge court issued an opinion denying a motion by the defendants in that case to modify or stay the judgment of December 24, 1991 ordering the court's own reapportionment plan into effect. Judge Garwood dissented. Near the end of the majority's opinion, the following statement appears:

> Until formal comment on the substitute Senate plan . . . has been made by the Department of Justice, elections cannot proceed under the Legislature's proposed plan as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next few days, the Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act. Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 12 (W.D. Tex. Jan. 10, 1992).

The Terrazas intervenors claim that this Court is bound by this statement under the doctrine of collateral estoppel. See Connors v. Tanoma Mining Co., 953 F.2d 682, 684 (D.C. Cir. 1992); United States v. Sherman, 912 F.2d 907, 909 (7th Cir. 1990). The Court rejects this contention on several grounds.

Collateral estoppel applies where four conditions are met:

(1) There is identity of issues between the first and second proceedings.

(2) The issue was fully litigated in the first proceeding.

(3) The issue was essential to resolving the case in the first proceeding.

(4) The party against whom the earlier ruling is being applied was fully represented in the first proceeding.

Two of the four prerequisites are wholly missing in this case. The contingent and gratuitous statement by the Terrazas majority does not rise to the level of full adjudication on the merits of the section 2 validity of SB 1. The issue was not litigated in the Terrazas case. The three-judge court in Texas held a preliminary injunction hearing during which it reviewed the validity of the previously enacted plan, SB 31, not SB 1. In fact, the Terrazas court explicitly stated in its December 24, 1991 opinion that it did not consider the Quiroz/Mena plan, the substantive equivalent of SB 1, because at that time it had been declared procedurally invalid by the Texas Supreme Court.[3] Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 6-7 (Dec. 24, 1991). There was no full and fair adjudication of the merits of SB 1 or its identical predecessor, the Quiroz/Mena plan.

Indeed the "facts" that are cited in the January 10 opinion do not go to the question of section 2 viability at all, rather they concern section 5 issues. The Terrazas court compares its plan to the Quiroz/Mena plan, substantively the same as SB 1, and concludes that its plan provides a "greater opportunity" for minority citizens to elect

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[3] The parties agree that SB 1 and the Quiroz/Mena plan are substantively identical. The Quiroz/Mena plan was ordered into place by a Texas state court. The Texas Supreme Court then ruled that it was procedurally invalid. The Texas legislature then met in special session in the first week of January, 1992, in order to enact the Quiroz/Mena plan so that it would be legally effective.

representatives of their choosing. Sl. op. at 5, and that "minority voting rights can be enhanced to a greater degree than provided in a Quiroz-style plan." Sl. op. at 9. It claims that SB 1 is "an impermissibly partisan reaction to this Court's superior interim plan." Sl. op. at 6. None of these observations support the conclusion that SB 1 violates section 2. They only support the Terrazas court's conclusion that its plan is superior to the plan chosen by the Texas legislature.

Moreover, the January 10 statement declaring that SB 1 violates section 2 was not essential to a resolution of the issues raised in that case. At that point, the only question for the Terrazas court to decide was whether it should stay implementation of its own plan and allow the state to proceed with the preclearance process for SB 1 or instead require that the primary elections be held under the court-crafted plan. The court's statement about the Texas legislature's plan was posed "in the alternative" and was contingent upon an event that had not yet occurred. In deciding whether to stay the implementation of its own court-crafted plan, the Court did not need to consider whether SB 1 violated section 2. Judge Garwood made this point in his dissent where he suggested that the court stay implementation of its own plan, await a preclearance decision from the Department of Justice, and consider the section 2 issue only after SB 1 was precleared. The section 2 question would have been moot if the Department of Justice refused to preclear SB 1. The Terrazas majority itself says that its principal concern is delay and that "[I]t does not appear that preclearance of any substitute plans

can be obtained in a timely fashion so as to allow the 1992 primaries to proceed in March as provided by existing state law." Terrazas v. Slagle, Nos. 91-425, 91-426, sl. op. at 10 (W.D. Tex. Jan. 10, 1992). In sum, there was no need for the Terrazas court to rule on the section 2 issue in order to decide whether to stay the implementation of the court-ordered electoral plan.

The Terrazas intervenors also claim that the Supreme Court affirmed the section 2 statement by the Terrazas majority when it granted summary affirmance in the appeal filed by the State of Texas. They argue that Supreme Court affirmance made the decision of the Terrazas court including its . . . . sentence about SB 1 final and of "sufficient firmness to be accorded conclusive effect." Motion for Summary Judgment of Defendant-Intervenors Louis Terrazas, et al. 4, citing Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1135 (Fed. Cir. 1985). But, as the Department of Justice points out persuasively in its motion opposing summary judgment for the Terrazas plaintiffs, the Supreme Court did not affirm any specific statements of the Terrazas court.

> A summary disposition affirms only the judgment of the court below, and no more may be read into [the Supreme Court's] action than was essential to sustain that judgment. Statement of the United States Concerning Effect of Supreme Court Action citing Anderson v. Celebrezze, 460 U.S. 780, 785 n. 5 (1983).

A summary affirmance decides only the precise questions presented on appeal. See Mandel v. Bradley, 432 U.S. 173, 176 (1977). Given the questions presented in the appeal

from the Terrazas decision,[4] the summary affirmance verifies only that Terrazas court was correct in denying a stay under the circumstances that existed on January 10, i.e. before the newly legislated plan, SB 1, had been precleared and at a time when it appeared that waiting for preclearance would cause delay harmful to the electoral process.

Under the doctrine of collateral estoppel, this Court is not bound by the statement of the Terrazas court in its January 10 opinion declaring that SB 1 violates section 2. The issue was not fully litigated by the Terrazas court, and a decision on the section 2 question was not essential to the issue that court had to resolve in its January 10 opinion. When making decisions about the validity of legislative policies under the Voting Rights Act, Courts are required to make detailed factual findings. As the Fifth Circuit itself has said,

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Cross v. Baxter, 604 F.2d 875, 879 (5th Cir. 1979) (citations omitted), vacated on other grounds, 704 F.2d 143 (5th Cir. 1983); see also Westwego Citizens for Better Government v. Westwego, 872 F.2d 1201, 1203 (5th Cir. 1989); Velasquez v. City of Abilene, 725 F.2d 1017, 1020 (5th Cir. 1984).

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4 The jurisdictional statement filed by the State of Texas presented the following questions:

> 1. May a local three-judge federal district court acting under section 5 of the Voting Rights Act substitute a court-crafted redistricting plan for a legislatively approved plan that obtained section 5 preclearance from the United States Department of Justice?
>
> 2. Does preclearance from the United States Department of Justice establish prima facie validity of a redistricting plan so as to preclude interim injunctive relief under section 2 of the Voting Rights Act absent extreme and unique circumstances?

In our view, the Terrazas majority did not adhere to this directive. It made a blanket statement without factual underpinnings or explanation about the section 2 invalidity of SB 1. While expressing clearly its preference for its own plan over the plan enacted by the legislature the Terrazas court failed to substantiate in any way its legal objections to the legislature's plan, instead relying principally on practical considerations like delay in reaching its decision.[5] Thus, we must take the statement for what it is worth, in its context and barren of specific factual findings.[6] Since the Terrazas intervenors st[illegible]heir motion for summary judgment entirely on the proposition that the court is bound by the Terrazas court's statement that SB 1 violates section 2, their motion fails by necessity and, accordingly, will be denied.

B. Preclearance of SB 1

In order to grant preclearance to a reapportionment plan a court must make two findings. First, the plan may not be retrogressive in terms of minority voting rights when

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5 The Fifth Circuit has also made clear that legislatively enacted plans are preferable to court-imposed plans except in the most unusual of circumstances. See Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985).

6 We note also that Judge Nowlin has since recused himself from any further participation in the case.

compared to the plan that would be in effect were the plan in question not approved. See Beer v. United States, 425 U.S. 130, 141 (1976). As noted above, SB 1 is the plan in question, and the plan that would be in effect, the benchmark, is the Terrazas plan. See Texas v. United States, 785 F.Supp. 201 (D.D.C. 1992). Second, discriminatory purpose may not be a motivating factor in the selection of the plan. See City of Richmond v. United States, 422 U.S. 358, 378 (1975). As an initial matter, we note that the Department of Justice has posed no objection to SB 1. See Notice of Filing of Section 5 Determination (July 21, 1992). Were it not for the presence of the intervenors in this litigation, there would be no dispute. However, given the unusual posture of this case, the Court will proceed to rule on Texas' motion.

The State of Texas has submitted detailed affidavits to prove that SB 1 meets the nonretrogression standard. Lynn Moak and Allan Lichtman are both experts in data analysis and redistricting. Mr. Moak performed a thorough comparison of SB 1 and the Terrazas plan. Mr. Lichtman then verified the accuracy and reliability of Mr. Moak's work. Mr. Moak concluded that SB 1 increases the number of districts in which minorities can elect candidates of their own choosing from eight to nine. It creates an additional Hispanic district as compared to the Terrazas plan. Review of recent primary election voting data also revealed "major differences . . . in the pattern of Black and Hispanic support." Affidavit of Lynn Moak, Motion for Summary Judgment, 3. He concluded that because of this phenomenon "mixed minority" districts would not actually

work and could not be considered minority districts. As a result, two of the districts identified in the Terrazas plan as minority districts and one of the districts identified in SB 1 as a minority district failed to qualify as minority districts under the standards of Mr. Moak's analysis. In District 13 in Harris County, SB 1's version does have a reduced African-American voting age population, however, Mr. Moak's regression model indicates that African-American voters will still be able to elect representatives of their choice. Also, the modification in District 13 allow for the creation of District 6 which will be a Hispanic district and allow for the possibility that District 15 may also become an African-American district.

Having reviewed Mr. Moak's work as well as the affidavit of Professor Lichtman who confirms that Mr. Moak's methodology is well-grounded in the literature and consistent with the methodology he uses in work for the Department of Justice, the Court credits these statements and adopts Mr. Moak's affidavit as its findings of fact.

As for the questions of discriminatory purpose, Texas has submitted the affidavits of seven state senators and representatives who participated in the creation and passage of SB 1.[7] Six of these officeholders are themselves African American or Hispanic. The seventh is the Dean of the Texas Senate. All of these individuals gave sworn statements affirming that there was no discriminatory

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7 The individuals submitting affidavits are Senator Gonzalo Barrientos, Senator Chet Brooks, Senator Rodney Ellis, Senator Eddie Bernice Johnson, Senator Judith Zaffirini, Representative Eddie Cavazos, and Representative Roman Martinez.

purpose behind SB 1. All of them note that SB 1 is endorsed by the majority minority organizations[8] in Texas. The Court credits these statements finds that there is no discriminatory purpose underlying SB 1.

The Terrazas intervenors, the only remaining party that opposes Texas' motion for summary judgment, have not filed any affidavits or other materials to raise a genuine issue of material fact. They rest on the same legal argument that they made in their own motion for summary judgment and point only to the statement of the Terrazas court in its January 10 opinion as the basis for their claim that there is a genuine triable issue concerning motive remaining in this case. The Court has already rejected this argument. We are not bound by the Terrazas court's statement, and it does not, without more, raise a genuine issue of material fact. The statement of the Terrazas court is conclusory only, and it is not accompanied by any specific references to testimony, evidence of personal knowledge. See Memorandum of the United States in Response to Motion for Summary Judgment of Defendant-Intervenors Terrazas, et al, 6 n. 3. Texas has offered the carefully researched opinion of experts, and the Terrazas intervenors have presented neither witnesses nor documents that would be able to contradict them.

Accordingly, the Court will grant Texas' motion for summary judgment and will grant preclearance to SB 1 under section 5 of the Voting Rights Act.

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8 As the phrase implies, a "majority minority organization" is one where the majority of the members of the organization are also members of a minority group. The NAACP would be an example.

Date:
07/27/92

s/s
Patricia M. Wald
United States Court of Appeals

s/s
Joyce Hens Green
United States District Court

s/s
Stanley Sporkin
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 27, 1992.

STATE OF TEXAS, et al.,	§	
	§	
vs.	§	Civil No. 91-2383
	§	(Stanley Sporkin)
UNITED STATES OF	§	
AMERICAN et al.	§	

ORDER

For the reason given in the foregoing opinion, it is this 27th day of July, 1992, hereby

ORDERED that the motion by Louis Terrazas, Tom Craddick, and for summary judgment is denied: and it is

FURTHER ORDERED that the motion by the State of Texas to reconsider the decision to allow the Terrazas parties to intervene in the case is denied; and it is

FURTHER ORDERED that the motion by the State of Texas for summary judgment is granted.

It is hereby DECLARED that SB 1 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, nor is SB 1 in contravention of the guarantees set forth in 42 U.S.C. § 1973b (f) (2).

s/s
Patricia M. Wald
United States Court of Appeals

s/s
Joyce Hens Green
United States District Court

s/s
Stanley Sporkin
United States District Court

AFFIDAVIT

STATE OF TEXAS|
COUNTY OF TRAVIS|

1.0 Introduction. The purpose of this affidavit is to present an analysis of two Texas State Plans. The first of these is current plan which was established by interim court order in the case of Terrazas v. Slagle (Civil No. A-91-CA-425, 426, & 428). The second plan is that enacted by the State of Texas under the provisions of Senate Bill 1, 3rd Called Session, 72nd Legislature. The current plan was analyzed in state computer systems as Plan S567. The state plan was analyzed as Plan S560. The state plan is identical to that originally precleared by the U.S. Justice Department as the Mena/Quiroz Settlement Plan. Copies of maps and summary data analysis for each districts are attached as Moak Exhibits 3 and 4 to this Affidavit.

1.1 Background. My name is Lynn M. Moak and I am a private consultant on matters pertaining to data analysis including but not limited to the field of redistricting. I have been qualified before state and federal courts as an expert in redistricting, data analysis, and political analysis with reference to Texas cases involving legislative and congressional redistricting in 1981 and 1992. In addition, I have been qualified as an expert witness in state court onmatters pertaining to governmental and public school finance analysis. In addition, I have been appointed as a

court expert in the continuing Texas litigation relating to the financing of Texas public school education.

1.2 Professionally, I have served in a variety of positions in Texas state government over the period 1966-1991 including Assistant Comptroller for Planning and Research (1975-76), Director of Research for the Office of Lieutenant Governor (1977-1982), Director of Redistricting for the Texas Senate (1979-1982), and Deputy Commissioner for Research and Development of the Texas Education Agency (1986-1992). I have also been a private consultant in the field of governmental research and currently am President of Moak Consulting which specializes in financial consulting with Texas school districts. I have a Bachelors Degree in Government and am enrolled in a Doctoral Program in Educational Administration at the University of Texas as Austin. I reside at 615 W. 35th St., Austin, TX 78705. A copy of my resume is attached as Exhibit Moak 1.

1.3 For the past year, I have worked with the Office of Texas Attorney General Dan Morales to analyze of a variety of redistricting plans related to congressional and Texas Legislative Districts. In this connection, I have had access to given direction to the resources and staff of that department including computer modelling, data analysis, and election data analysis. The conclusions reached in this analysis are derived from that effort.

1.4 I have been asked to undertake a comparative analysis of the court plan of the Texas Senate and of the state plan adoped by the State in January 1992 with respect to the impact of these plans on the opportunities of Hispanics and Blacks to elect representatives of their choice. The current plan was imposed by court order. The proposed plan was adopted by the legislative enactment. The affidavit contains the summary results of that analysis. Additional detailed statistical analysis is available based on the application of the computerized models to all districts and a variety of elections districts. The additional data supports and confirms the information presented herein.

2.0 Summary. The state plan adopted as Senate Bill 1 does not reduce the ability of the Blacks and Hispanics to elect candidates of their choice but rather increases the number of districts in which minorities are able to elect candidates of their choice from eight to nine. In addition, the plan improves upon prior plans including the previous state plan upon which elections were conducted from 1984 to 1990 by increasing the number of minority districts. This information is presented in Table 1 "Summary of Results of Texas Senatorial Plan Comparison."

TABLE 1 SUMMARY OF RESULTS OF TEXAS SENATORIAL PLAN COMPARISON

AREA/DISTRICT	COURT DISTRICTS	STATE DISTRICTS
1. DISTRICTS OF MINORITY CHOICE	8	9
-BLACK	2	2
-HISPANIC	6	7
HOUSTON AREA		
DISTRICT 13-% BLACK VAP	57.20%	50.30%
DISTRICT 15/6-% HISPANIC VAP	51.60% (insufficient)	57.10%
DALLAS AREA		
DISTRICT 23-% BLACK VAP	46.00%	46.30%
SAN ANTONIO AREA		
DISTRICT 19/26-% HISPANIC VAP	56.30%	59.80%
DISTRICT 24/19-% HISPANIC VAP	54.20%	58.20%
CORPUS CHRISTI AREA		
DISTRICT 20-% HISPANIC VAP	57.90%	57.10%
SOUTHWEST TX. AREA		
DISTRICT 21-% HISPANIC VAP	76.90%	78.60%
RIO GRANDE VALLEY AREA		
DISTRICT 27-% HISPANIC VAP	76.90%	78.60%
EL PASO AREA		
DISTRICT 29-% HISPANIC VAP	67.10%	67.30%

3.0 Methodology. The comparison of the two plans combined analyses of population, voting age population, voter registration and election results over the period 1986-1992, including the 1992 Democratic primary elections which concluded on April 14, 1992. This data was further analyzed using a series of regression based equations developed in concert with data analysis experts of the Texas Office of Attorney General. This model used a double equation approach for the development of estimates of Hispanic, Black, and Anglo voter turnout, participation, and voter choice. A technical description of the model is presented in Exhibit Moak 2. Through this model estimates have been developed for a variety of elections over the time period 1986-1992. These elections included statewide races, the party primary, and general elections level as well as local contests. The analysis was conducted over a period of months and relied upon the nationally recognized expertise of Dr. Allan Lichtman. The original data was processed by the Texas Legislative Council in the development of a statewide redistricting system which has been used by all parties in the development of potential redistricting plans.

3.1 The nine districts in each plan shown on Table 1 with 45 percent or more of a single minority were initially considered. Population data from the balance of the state was examined to determine if additional minority districts could have been created. No such concentrations were located in either plan. Election data for 14 statewide races

involving a minority candidate and a variety of local races was then used to determine the potential impact of voter behavior as expressed through registration, turnout and candidate choice. As a result, eight of the nine districts in the court plan were classified as minority choice districts. Under the state plan all nine of the districts were classified as minority choice districts. The treatment of a new Hispanic district in Houston constituted the major difference between the two plans.

3.2 Two additional districts were analyzed. These districts each had combined minority voting age of less than fifty percent and individual minority voting age populations of less than 30 percent. This analysis revealed no significant potential for the election of a minority choice candidate in either district. Critical to this analysis was the absence of consistent coalition voting which is considered below. Under this analysis no pattern of dependable coalition voting among the two minority groups was found in either non-partisan or Democratic Party primary elections in the affected counties.

4.0 Key Research Findings Two key historical trends were derived from the election analysis and were used in the determination of the electability of minority choice candidates. Each of these related to minority group voting behavior. First, the ten districts analyzed in each plan all displayed a predominant Democratic Party election preference regardless of the race of the candidate in general elections in 1988 and 1990. In 1990, nine statewide races

were identified in which a high degree of competition was present. Under the current plan, Democratic candidates won all nine elections in nine districts and eight of nine in the other. Under the proposed plan all ten districts featured Democratic sweeps of the identified contests. Nomination by the Democratic Party in each of these districts leads directly in election in most cases. This result underlined the importance of a major review of Democratic Party primary elections.

4.1 The review of the Democratic Party primary elections in the affected counties reveals a clear and increasing lack of coalition voting in elections in Harris, Dallas and, to a lesser extent, Tarrant County. In each of these cases a substantial number of local contests were found in which major differences were observed in the pattern of Black and Hispanic support. This observation leads directly to the conclusion that the concept of "mixed minority" districts is not appropriate for application to Texas districts in these counties other than in terms of the analysis of general election contests. This condition led directly to the failure to classify three districts classified as minority choice districts. Districts 12 and 15 in the court plan and District 15 in the state plan were the subjects of this additional review. The regression model, extreme case analysis and grouped precinct analysis confirmed this result. Table 2: "Estimated Voting Preferences of Black and Hispanic Voters in Selected Election Contests in Three Texas Counties" presents a summary of the results which led to this

conclusion. Unless noted all of the contests were based on full county data.

Table 2 Estimated Voting Preferences of Black and Hispanic Voters in Selected Election Contests in Three Texas Counties

ELECTION	YEAR/TYPE	EST. % BLACK VOTE FOR MINORITY CANDIDATE	EST. % HISPANIC VOTE FOR MINORITY CANDIDATE
1. HARRIS COUNT (HOUSTON)			
177TH DISTRICT JUDGE	1988 DEM. PRI	51	19
215TH DISTRICT JUDGE	1988 DEM. PRI	88	34
STATE TREASURER	1990 DEM. PRI	10	65
55TH DISTRICT JUDGE	1990 DEM. PRI	67	33
CRIM. APPEALS CT.	1992 DEM. PRI	69	18
STATE SENATE (DIST. ONLY)	1992 DEM. PRI	9	100
2. DALLAS COUNTY			
DISTRICT ATTORNEY	1986 DEM. PRI	89	0
TREASURER (STATE)	1990 DEM. PRI	38	74

CT OF CRIM APPEALS	1992 DEM. PRI	90	0
RAILROAD COMM.	1992 DEM. PRI	59	100
3. TARRANT			
CT OF CRIM APPEALS	1990 DEM PRI	61	41
STATE TREASURER	1990 DEM PRI.	32	66
SHERIFF	1992 DEM. PRI	43	98
CT. OF CRIM APPEALS	1992 DEM. PRI	88	60

5.0 Harris County - Hispanic District. The major improvement of the state plan over that of the court imposed plan is found in the "Hispanic" district of Harris County. Regardless of the measure employed, the state plan provides a superior opportunity for the Hispanic community to elect a candidate of their choice. Further, given the results of two 1992 Democratic Primary elections within the current District 15 in which the overwhelming choice of the Hispanic community was defeated, it is clear that improvement is needed in this district as configured by the court to ensure the selection of a candidate of minority choice. The state plan adopted by the legislature affords that choice.

5.1 Overall, the two configurations are similar. Of the 512,391 persons living in the proposed District 6,425,982 or 83 percent live in the current district 15. Of the total Hispanic population of the proposed district of 320,716,283,250 live in the current District 15. The

political pattern of either district will favor the Democratic Party candidate. For the 1988 and 1990 general elections, for instance, the Democratic candidate won in 28 of 28 statewide elections in both versions. As indicated above, no reliable coalition exists between the three racial /ethnic groups represented in the community. For instance, in the 1991 election for Mayor of Houston, a black candidate is estimated to have received little or no support from either the Anglo or Hispanic communities within District 15 while in the 1992 Democratic Primary for District 15, the Hispanic candidate received little or no support from either the Anglo or Black communities.

5.2 As a result of the foregoing, the analysis of the two configurations must concentrate on the Democratic primary election as the key decision point in either configuration for the determination of the potential of the Hispanic Community to elect a candidate of their choice. The table below compares the two districts on critical variables.

Table 3: COMPARISON OF SELECTED VARIABLES BETWEEN THE CURRENT DISTRICT 15 AND THE PROPOSED DISTRICT 6

VARIABLE	CURRENT DISTRICT 15	PROPOSED DISTRICT 6	PROPOSED-CURRENT
1. TOTAL POPUL.	528,584	512,391	-16,193
2. VOTING AGE POPUL.	361,135	344,481	-16,654

3. % HISPANIC POPUL.	57.1%	62.6%	+ 5.5
4. % HISPANIC VOTING AGE POPUL.	51.6%	57.1%	+ 5.5
5. % SPANISH SURNAME REG. VOTERS	26.0%	31.6%	+ 5.6%
6. EST. HISPANIC % OF 1990 PRIM. VOTE	34%	58%	+ 24%
7. EST. HISPANIC % OF 1992 PRIM. VOTE	47%	72%	+ 25%
8. EST. HISPANIC % OF 1990 GENERAL ELECTION VOTE	19%	36%	+ 17%
9. % OF VOTES FOR MORALES (1990 DEM. PRI.)	56%	58%	+ 2%
10. % VOTE FOR GUERRERO (1992 D.P.)	68%	71%	+ 3%
11. % VOTE FOR MARTINEZ (1992 DEM. PRI.)	49%	EST. 53%	+ 4%

5.3 The significance of general election analyses is supported and strengthened by the outcome of the 1992 Democratic Party primary and runoff for District 15. In the first election, the Hispanic candidate Martinez received 48.9% of the vote including virtually all of the Hispanic vote, 24% of the Anglo vote and 9 percent of the Black vote according to the estimates produced by the election analysis model. In the runoff, the Hispanic candidate received virtually all of the Hispanic vote and little or no support from the other two communities. The second attempt garnered 48% of the total vote. The results of this election could clearly have been different if the proposed plan had been in place. For the portion of the districts which overlap, the Hispanic candidate received 59 percent of the vote. With the addition of the remaining 17 percent of the district, this level should have dropped to no less than 53 percent of the district vote.

6.0 Harris County - The Black District. Each plan provides a district within the Houston area in which the black community may elect a candidate of their choice. District 13, which has elected a Black Senator for the past ten years, contains a majority of black voting age population in each plan. The current plan establishes a level of 57.2% compared to the proposed plan percentage of 50.3%.

6.1 As shown in Table 1, the percentage of Black voting age population is reduced under the state plan when compared to the state plan. This reduction does not impact the ability of the Black community to elect a candidate of their choice.

As indicated in Table 3 below, the Black community has sufficient strength under the state plan in the Democratic Primary to control the election results according the results of the regression model. When the overwhelmingly Democratic Party dominance of this district is taken into account, control of the primary election process translates into electoral control of this district by the Black community. The modification in District 13 additionally permits the modifications necessary to the creation of District 6 above and to District 15 in Harris County. With the significant base of over 25% Black voting age population and a significantly higher share of the Democratic Party primary vote, District 15 may well develop into a second Black District for Harris County. The following table compares key statistics for the two versions of District 13. The participation estimates are based on the most conservative result of several available.

Table 4 Comparison of Selected Characteristics of District

Variable	Court	State
% Black VAP	57.2%	50.3%
Est. Black Vote-1990 Dem Pri	88%	72%
Est. Black Vote-1992 Dem Pri	87%	71%
Est. Black Vote-1990 General	70%	50%

7.0 Dallas County - The Black District. District 23 is classified as a minority district in each plan despite a level of black voting age population of less than 50 percent. The

rationale for this conclusion lies in the strong level of black voter participation at both the general election and democratic primary election levels. The following table portrays the results of this comparison.

Table 5 Comparison of Selected Characteristics of District

Variable	Court	State
% Black VAP	46.0%	46.3%
Est. Black Vote-1990 Dem Pri	78%	76%
Est. Black Vote-1992 Dem Pri	72%	73%
Est. Black Vote-1990 General	61%	54%

8.0 Other Districts In all other districts classified as minority, the state plan represents a realignment of geography rather than a major change in the ability of the Hispanic minority to elect a candidate of their choice. In five of the six districts relative Hispanic strength is increased as seen on Table 1 above. In the remaining district the decrease is only .8% and does not impact the ability of the minority community to elect a candidate of choice. In the case of all six districts under either plan, there is significant evidence that a cohesive Hispanic community will continue to elect the candidate of choice. Exceptions will occur when the Hispanic Community is not cohesive such as in the case of District 29 (El Paso) where a division in the Hispanic community has permitted the election of a candidate who is not the choice of the majority

of the Hispanic community. This applies to either version of District 29.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 9th day of July, 1992.

s/s
Lynn M. Moak, Affiant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed August 21, 1992 at 11:54 p.m.

LOUIS TERRAZAS, et al.,	§	
	§	
vs.	§	CIVIL NO. A-91-CA-426
	§	
BOB SLAGLE, et al.	§	

ORDER AND REASON

Before the Court is the motion of plaintiffs, Louis Terrazas, *et al.*, filed August 7, 1992, to enforce the prior orders of this Court filed herein December 24, 1991 and January 10, 1992, as amended January 13, 1992, respecting the Texas Senate redistricting plan to be implemented for the 1992 elections, and to require defendant John Hannah, Jr. (Hannah), the Secretary of State of Texas, to rescind the directions and instructions that he issued August 6, 1992, regarding the 1992 Texas Senate elections, and to prevent defendants Bob Slagle (Slagle), Chairman of the Democratic Party of Texas, and Fred Meyer (Meyer), Chairman of the Republican Party of Texas, and all acting in concert with them, from complying with or carrying out Hannah's said directions and instructions. Also before the Court are similar motions filed by plaintiff-intervenor David Sibley and by plaintiff-

intervenor Bill Sims. Responses to plaintiffs' said motion have been filed by Slagle and, jointly, by Hannah and defendants the Governor and Attorney General of Texas (herein collectively the "state" or "state defendants"). The United State Department of Justice as, with leave of Court, appeared and filed an *amicus* brief. After due notice, this Court held a hearing and received evidence and argument on said motions on August 17, 1992, and, having taken the matter under advisement, now issues this its order and judgment herein.

This Court's December 24 order was issued in this cause and in consolidated causes numbers A-91-CA-425, regarding the Texas House of Representatives redistricting, and A-91-CA-428, regarding redistricting of Texas Congressional Districts, and followed an approximately four-day hearing that began December 10, 1992. This Court denied interim relief in No. 428. As to the Texas House and Senate, this Court had before it and considered, as to each body, redistricting plans passed in 1991 at the regular session of the 72nd Texas Legislature (H.B. 150 for the House; S.B. 31 for the Senate) that had not been precleared under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, plans submitted by the plaintiffs, and plans that had been ordered pursuant to settlements in state court suits (*Mena v. Richards*; *Quiroz v. Richards*) in Hidalgo County, Texas, and that, as to the Senate ("*Quiroz*" plan), had been precleared by the United State Department of Justice in November 1991 but had been invalidated on procedural grounds by the Texas Supreme Court on December 17, 1991. *Terrazas v. Ramirez*, 829 S.W.2d 712

(Tex. 1991). The Court's December 24 order recites "[b]efore the Court is plaintiffs' motion for implementation of interim plan filed in cause No. A-91-Ca-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in cause number A-91-CA-426 on November 27, 1991; . . . . " This Court ordered into effect its own "interim state legislative redistricting plan" for the House and Senate each "to provide for the holding of elections in Texas without delay and in accordance with existing state law," and decreed, among other things, as follows:

> " . . . it is the Judgment of this Court that the 1992 primary elections proceed as follows:
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in . . . [the 1991 state legislative fixing congressional district];
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;
>
> IT IS FURTHER ORDER, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;
>
> IT IF FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the

1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for candidates to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992."

The 72nd Texas Legislature convened its third called session on January 2, 1992, and adjourned on January 8, 1992. During this session the legislature passed a bill (H.B. 1) redistricting the Texas House "beginning with the election of the 74th legislature" (the 1994 elections), but no legislation was enacted respecting House redistricting for the 1992 elections. Also passed was a bill (H.B. 2) rescheduling all the primary elections for April 11, 1992.[1]

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1 H.B. 2 also included the following provision:

"SECTION 8. NOMINATION BY EXECUTIVE COMMITTEE.

(a) If a redistricting plan for either house of the legislature is to be effective for the 1992 general election for state and county officers and that plan is different form the plan used in the 1992 primary elections, and if a political party has no nominee for a particular office under the new plan, the political party's appropriate executive committee may nominate a candidate to appear on the general election ballot for that office. This subsection does not apply to an office the district of which office the district of which includes the same territory under the new plan as it did under the plan used in the 1992 primaries.

(b) The secretary of state shall prescribe the procedures necessary to implement this section."

As this bill did not receive a two-thirds vote, it could not be effective, under Tex. Const. art. III § 39, until ninety days after adjournment, or April 8, 1992. Finally, the legislature passed on January 8 a bill (S.B. 1) redistricting the Texas Senate, stating that it "takes effect beginning with the election of the 73rd Legislature," *i.e.*, beginning with the 1992 elections. However, this bill did not receive a two-thirds vote, and hence it, too, was not effective until April 8, 1992. The senatorial districts provided for in S.B. 1 are the same as those in the *Quiroz* plan.

On January 9, 1992, the state defendants filed a motion to modify or vacate this Court's December 24, 1991 order in respect to the House and Senate. The state's said motion (as well as its motion to modify or stay filed December 31, 1991) was denied in our January 10, 1992 order. A principal contention of the state was that the S.B. 1 plan should be used for the Senate, that it had been in effect precleared because it was identical to the *Quiroz* Senate plan that had been precleared in November 1991, and that even if further preclearance were required that could likely be achieved in time for the primaries to take effect for the April 11, 1992 primary date specified in H.B. 2. The state defendants also requested that the House districts specified in H.B. 1 (which were the same as those of the *Mena* settlement) be used for the 1992 elections.

The United States of Justice on March 10, 1992, denied the state's request for preclearance of this provision under section 5 of the Voting Rights Act.

In denying relief, this Court's January 10 order states in part:

> "In the present case, this Court's December 24, 1991 judgment does no more than provide for the holding of 1992 elections as scheduled under Court-ordered interim plans that temporarily address voting rights deficiencies in the plans passed by the Texas Legislature. In denying the stay, this Curt in no way intends to limit the efforts of the Legislature in adopting acceptable permanent plans at any time it sees fit. Early in this second called Session, the Texas House approved this Court's interim plan redistricting that body for the 1992 primary elections, and fashioned a substitute permanent plan to be implemented for the 1994 elections. The Texas House indicated it approved the Court plan in order to guarantee that the elections go forward as presently scheduled."

The January 10 order also states:

> " . . . this substitute plan ("S.B. 1") adopted by the Legislature is identical to the one submitted by the parties in the *Quiroz* case in Hidalgo County. That "Quiroz plan" was before this Court during the period in which it reviewed SB 31, found that law in violation of the Voting Rights Act, and drafted its interim plan. Had this Court believed that the "Quiroz plan" better addressed the interest of minority voters its plan would have more closely mirrored the Senate districts drawn by the parties in Quiroz.
>
> A detailed comparison of the Court's interim plan with the "Quiroz plan" reveals that the Court's plan, and not Quiroz , provides a greater opportunity for all minority citizens of the State of Texas to elect representatives of their choosing.
>
> . . . .
>
> Until formal comment on the substitute Senate plan ("Quiroz plan") has been made by the Department of Justice, elections cannot proceed under the Legislature's proposed plan [S.B. 1] as scheduled under current state law. Alternatively, should the opinion of the Department of Justice issue in the next few days, this Court has already reviewed testimony and other evidence on the Senate's substitute plan during the December hearings and finds it fails to satisfy the Sec. 2 requirements of the Voting Rights Act."

The January 10 Order concluded by stating:

> "ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that the State Defendants' Motion to Stay is in all things DENIED, and that the 1992 primary elections proceed as presently scheduled under state law, with an elections date of March 10, 1992;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that primary elections for the Texas Senate and Texas House of Representatives be conducted under this Court's interim plans attached as Appendices A and B to this Court's Judgment entered December 24, 1991;
>
> IT IS FURTHER ORDERED that the candidate filing deadlines for the 1992 primary elections to all offices remains January 10, 1992."

The primary elections for the Texas Senate and House (as well as other offices) were held March 10, 1992, according to this Court's aforesaid order and in the districts established thereby, as were also the subsequent run-off primaries in April 1992. The nominees of the parties for the 1992 general election for the Senate (and other offices) were thus selected.

The state defendants appealed this Court's December 24, 1991 and January 10, 1992 orders to the United States

Supreme Court, and also made requests to that Court for a stay of those orders. All the requests for stay were denied. *See Richards v. Terrazas*, 112 S.Ct. 924 (No. A-498, January 16, 1992); *Richards v. Terrazas*, 112 S.Ct. 1073 (No. 91-1270, February 15, 1992). *See also Richards v. Terrazas*, 112 S.Ct. 1157 (NO. 91-1270, February 24, 1992; denying motion of appellants to expedite); *Richards v. Terrazas*, 112 S.Ct. 2272 (No. 91-1270, May 26, 1992; denying motion of plaintiffs in *Mena* state suit to intervene). On June 29, 1992, the Supreme Court in the state's appeal entered its order stating that "The judgment is affirmed." *Richards v. Terrazas*, 112 S.Ct. 3019 (No. 91-1270).[2] That is clearly a judgment on the merits.

On July 27, 1992, the United States District Court for the District of Columbia issued its opinion and order in its cause No. 91-2383, *State of Texas v. United States*, which was a suit brought by the state pursuant to section 5 of the Voting Rights Act to preclear legislative redistricting plans, in which the state sought, *inter alia*, to preclear that of S.B. 1. The plaintiffs in the present case (Terrazas, et al.) were permitted to intervene. The state filed a motion for summary judgment supported by affidavits; the motion was opposed only by the parties Terrazas, and they did so solely on the basis that the statement in this Court's January 10 order that S.B. 1 violated section 2 of the Voting Rights Act

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2 We are informed that defendant Slagle also took a separate appeal, which apparently has been docketed in the Supreme Court as *Slagle v. Terrazas*, No. 91-1546, and that the Supreme Court has taken no action on the jurisdictional statement therein. On February 19, 1992, the Supreme Court denied Slagle's request for stay pending appeal. *Slagle v. Terrazas*, 112 S.Ct. 1075 (No. A-599).

(42 U.S.C. § 1973) collaterally estopped the state from contending otherwise. The District of Columbia Court rejected the collateral estoppel argument, on the basis that the statement relied on was not necessary to this Court's decision, and, on the basis of the state's unrebutted affidavits, concluded that the districts as provided for in S.B. 1 were more favorable to minority voters than those provided for in this Court's plan. The court thus rendered judgment granting preclearance to the S.B. 1 redistricting plan under section 5 of the Voting Rights Act.[3]

On August 6, 1992, defendant Hannah promulgated the directive at issue here.[4] In essence it directs that:

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3 We are not informed as to whether or not that judgment has become final and appealable or, if so, whether it has been appealed.

4 It is entitled "Directive," dated August 6, 1992, from Hannah, as Texas Secretary of State, and is addressed "To: County Clerks, Voters Registers, Election Administrators, Party Officials." Its text states:

> "This Directive is issued pursuant to my authority as Chief Election Officer of the State of Texas and under Sections 31.001, 31.003, 31.004, and 31.005 of the Texas Election Code. All matters in this Directive pertain to the 1992 General Election for State and County Officers.
>
> 1. The election for the Texas Senate on November 3, 1992, shall be held pursuant to Senate Bill 1, 72nd Legislature, 3rd Called Session, 1992 (hereinafter referred to as "S.B. 1")
>
> 2. The candidates who received the nominations of their respective parties for Texas Senate in the 1992 primary elections will be the nominees for the same numbered Senate Districts in November, 1992, under S.B. 1.
>
> 3. Upon the request of a nominee for the Texas Senate who does not reside in the in the Senate District, under S.B.1, for which he or she was nominated in the primary

(1) the 1992 general elections for the Texas Senate shall be held in the districts established by S.B. 1, rather than in those established by this Court's prior orders in which the primaries (and run-off primaries) were held and the nominees chosen;

(2) the nominees for the 1992 general election to be conducted in each given numbered senatorial district established by S.B. 1 will be the nominees selected at the primaries for the "same numbered" senate district under this Court's plan;

(3) however, on the request of such a nominee who does not live in the S.B. 1 district for which he was "nominated" as aforesaid, the state party chair may declare the nominee ineligible, in which event the party executive committee may designate the nominee for such S.B. 1 district.[5]

There has been no preclearance of the August 6 directive or the procedures mandated or authorized thereby. However, it appears that on August 14 the state forwarded a section 5 preclearance request in this respect to the Department of Justice, although maintaining that such was not necessary.

To place the August 6 directive in context, it is necessary to understand that the same numbered senate districts in this Court's plan under which the primaries were conducted and those in S.B. 1 are each different geographical regions with different populations. None of the thirty-one same numbered district are the same. While there is relatively close correspondence in a few districts,[6] in the others there is wide-in one case total-disparity. Thus, S.B. 1 senate district 24 is comprised entirely of counties none of which were included (in whole or in part) in court plan district 24, and the populations and territories of the two districts are 100% distinct; the only commonality between the two is that each is described by the same number "24." District 24 under the court plan was a minority district; S.B. 1 district 24 is not a minority district.

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elections, the appropriate State Chair shall administratively declare the nominee ineligible under Section 145.003 of the Texas Election Code by the deadline of August 31, 1992.

4. In the event a nominee is administratively declared ineligible under Section 145.003 of the Texas Election Code, the appropriate party executive committee may name a replacement nominee under Sections 145.036 and 145.037 of the Texas Election Code not later than September 4, 1992. A replacement nominee must meet the qualifications of Article III, Section 6 of the Texas Constitution and may include a previous nominee who was administratively declared ineligible under Item 3 above.

Any questions concerning lines or maps of S.B. 1 should be directed the Texas Legislative Council at (512) 463-1143. Any questions concerning any other matter relating to the election of the Texas Senate should be directed to John Tunnell, General Counsel to the Secretary of State, at (512) 463-5701."

5 Such replacement nominee must meet residence requirements in the S.B. 1 district for which so nominated, but may be one who was nominated in the primary for a district with a different number under this Court's plan and who, at his request, was declared ineligible for such district by the party chair under the above provisions.

6 In 4 of the S.B. 1 districts the percentage of the population that was included in the same numbered court district is at or above 95% (the highest being 98.4%). In all the other S.B. 1 districts the percentage is less than 95%.

Similarly, in S.B. 1 district 6, only 3.4% of the population lives in any of the area included within court plan district 6. In S.B. 1 district 26, only 2.1% of the population lives in any of the area included within court plan district 26. In S.B. 1 district 15, only 14% of the population lives in any of the area included within court plan district 15. In some eleven of the thirty-one S.B. 1 districts less than half of the population consists of persons living in any of the area included within the same numbered court plan district.[7]

The parties focus on two principal contentions:

First, movants contended that the August 6 directive may not be implemented because it has not been precleared under section 5. The Justice Department agrees with this position. The state and Slagle contend that S.B. 1 having been precleared, no further preclearance is necessary.

Second, movants contend that the August 6 directive conflicts with this Court's December 24 and January 10 orders because those orders require use of the court plan senate districts for the 1992 elections. The state and Slagle contend that this Court's said orders pertain only to the 1992 primary elections and may not be construed to extend to the 1992 general elections.

We agree with movants, and disagree with the state and Slagle, on both grounds. And we grant relief accordingly.

Turning first to the matter of preclearance, this is required by section 5 of the Voting Rights Act respecting

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7 In approximately 17 of the S.B. 1 districts less than 75% of the population consists of persons living in any of the area included within the same numbered court plan district.

any change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. In *NAACP v. Hampton County Election Commission*, 105 S.Ct. 1128 (1985), the Supreme Court stated that "Congress specifically endorsed a broad construction" of this provision, *id.* at 1134, that the Court had applied it to, among other things, changes in candidate residence requirements, alteration of municipal boundaries, and the location of polling places, *id.* n.22, and that "the construction placed upon the Act by the Attorney General . . . is entitled to considerable deference." *Id.* at 1135. The Court then went on to say:

> "Under Department of Justice regulations"
>
> 'Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.' 28 CFR § 51.11 (1984).
>
> Among the specific examples of changes listed in the regulations is '[a]ny change affecting the eligibility of persons to become or remain candidates." § 51.12." *Id.* at 1135-36.

Texas law and practice has consistently been that at the general election for state offices the nominees of the respective political parties are those nominated at the preceding party primary elections. Texas Election Code §§ 161.008, 172.001. Primary elections for offices chosen by the electorate in separate geographical districts obviously make no sense unless the districts are the same for the

ensuing general election as for the primary, and we must presume that this is the intendment of the Texas law. We agree with the Justice Department's undisputed assertion that "To our knowledge, the State of Texas has never held or sought to hold a general election under a redistricting plan different from the plan used for the preceding primary election." Because the Secretary of State's August 6 directive makes this vast departure from settled Texas law and practice, it is clearly a change for purposes of section 5.

The August 6 directive makes other changes within section 5. Thus, the directive authorizes persons to be general election candidates, and to be elected, in an S.B. 1 district even though they do not meet the Texas Const. art. III § 6 residency requirements for that district, so long as they won the primary in the same numbered court plan district, a district that may be totally or substantially different (and certainly will be somewhat different).[8]

The state argues that the August 6 directive merely implements S.B. 1, which has been precleared. We reject this contention, just as the Supreme Court rejected a parallel contention in *Hampton County Election Commission*, 105 S.Ct at 1136-37. We note that nothing in S.B. 1 purports to authorize the choosing of party nominees by primaries in districts different from those to be used in the

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8 This Court's December 24 order did waive the residency requirement "for elections held under the State House and State Senate interim plans in 1992," but this reference to "interim plans" was clearly to the Court's plans, as is made clear from the fact that in the two paragraphs immediately preceding the paragraph just before that dealing with residency the Court's plans are each described as "this Court's interim plan."

general election. Indeed, S.B. 1 plainly contemplates that the same districts will be used for the general elections as for the primaries. Nor does it speak to residency requirements. Further, nothing in the opinion or judgment of the District of Columbia District Court speaks to any of these matters.

The state also contends that because the August 6 directive is within the powers conferred on the Secretary of State by divers provisions of the Texas Election Code, which have themselves been precleared, further preclearance is not required.[9] The provisions relied on by the state are of the most general character, and none come close to addressing the subject matter of general election nominees for particular districts being chosen on the basis of primary elections in other districts, or to waiver of residency requirements.[10] We reject this contention for essentially

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9 Movants dispute that the Secretary of State has this power under state law, a proposition with which we are inclined to agree but need not reach. We agree with movants' further contention that even if the Secretary of State does have such general power, his exercise of it in a particular case must nevertheless be precleared.

10 The state relies on Tex. Elec. Code §§ 31.001, 31.003, 31.004, and 31.005. These sections provide:

" § 31.001. Chief Election Officer

(a) The secretary of state is the chief election officer of the state.

(b) The secretary shall establish in his office an elections division with an adequate staff to enable him to perform his duties as chief election officer. The secretary may assign to the elections division staff any function relating to the administration of elections that is under his jurisdiction."

"§ 31.003. Uniformity

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the elections laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws."

"§ 31.004. Assistance and Advice

(a) The secretary of state shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code.

(b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties."

"§ 31.005. Protection of Voting Rights

(a) The secretary of state may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.

(b) If the secretary of state determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general."

While the state also points to Tex. Elec. Code §§ 145.003, 145.035, 145.036, and 145.037, which are more specific, none of these provisions speak to or purport to authorize the changes mentioned in the text.

the same reasons as were stated by the court in *United States v. State of Texas*, Civil Action No. SA-85-CA-2119 (W.D. Tex. Aug. 1, 1985) (three-judge court), *aff'd* 106 S.Ct. 844 (1986), *viz*:

> "Nor do we agree with the State's contention that preclearance of the election code carried with it approval by the Attorney General of whatever emergency election schemes were subsequently ordered by the state election official. The construction of the Attorney General's prior action is made clear by his appearance in this case as well as by Department of Justice regulations:
>
> 'Enabling legislation and contingent or nonuniform requirements.
>
> (a) The failure of the Attorney General to interpose an objection to legislation: (1) That enables or permits political subunits to institute a voting change or (2) that requires or enables political subunits to institute a voting change upon some future event or if they satisfy certain criteria does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation.'
>
> 29 C.F.R. § 51.14(a) (1984)."[11]

Were this not the law, municipal annexations and deannexations-which must be precleared, 28 C.F.R. § 51.13(e) (1991); *Hampton County Election Commission*, 105 S.Ct. at 1134 n.22-would rarely have to be precleared because most are conducted pursuant to pre-Voting Rights

11 This provision now appears at 28 C.F.R. § 51.15(a) (1991).

Act coverage, or previously precleared, general grants of authority by legislation or constitutional provision.

Accordingly, we hold that the August 6 directive must be, but has not been, precleared under section 5 of the Voting Rights Act, and may not be implemented.

We now turn to the question of the meaning, and hence the effect, of this Court's December 24 and January 10 orders with respect to whether the Court's interim plans therein promulgated apply to the 1992 elections generally or only to the 1992 primaries. If, as movants contend, they apply to the 1992 elections generally, then Hannah's August 6 directive is clearly in violation thereof. The state and Slagle, pointing to the frequent use in the orders of the word "primary," as well as the reference to the "interim" nature of the plans, contend that they apply only to the primaries. We disagree. Although there is a certain surface, technical plausibility in defendants' argument in this respect, we conclude that when read as a whole and in context it is clear beyond reasonable dispute that the orders contemplate and require use of the court-ordered plans throughout the 1992 elections.

In common and universal usage the words "primary elections," with respect to offices filled by election from diverse geographically defined single member districts, mean elections in which will be chosen the party nominees for the next general election in the same district as that in which the primary election takes place. And this is clearly the accepted meaning of the term in the law and long settled practice of Texas. It cannot have reasonably been thought that our orders used the words in any other sense.

Moreover, for a redistricting case, particularly one under the Voting Rights Act, to order a redistricting plan fixing the boundaries of the several single member districts for the primaries only, and not for the next general election at which the officials would actually be selected, would be the height of futility and purposelessness.

Other textual and contextual considerations point in the same direction. Our December 24 order expressly grants plaintiffs' motion for interim relief filed November 27 in cause No. 426, which motion clearly requests implementation "of an alternate redistricting plan for the 1992 election for the Texas Senate" and is obviously not limited to the 1992 primary, but seeks interim relief in the sense of relief only for the 1992 election. The December 24 order waives residency requirements "for elections held under the State House and State Senate [court ordered] interim plans in 1992," clearly indicating that the court ordered plans applied throughout the 1992 elections. They were "interim" only in the sense that they did not govern after the 1992 elections. And, the December 24 order characterized itself as providing for the holding of elections "in accordance with existing state law," which clearly contemplated that the same districts would be used for the general election as for the preceding primary.

Similarly, our January 10 order characterizes our December 24 order as providing "for the holding of 1992 elections as scheduled under Court-ordered interim plans." While we said we did not intend to limit the legislature in thereafter adopting "permanent plans," this clearly referred to plans for 1994 and subsequent elections, as our citation

to the action of the Texas House in the 3rd called session plainly reflects (H.B. 1).[12] This likewise reflects our understanding -and our understanding of the House's understanding-that our orders governed the 1992 elections, general as well as primary.

Our prior orders directed the 1992 House and Senate elections-general as well as primary-be held according to the districts specified in the orders. These orders have been affirmed on the merits by the United States Supreme Court. The August 6 directive is unlawful because it is in conflict with this Court's said previous orders.

IT IS ACCORDINGLY ORDERED, ADJUDGED and DECREED:

1. That the August 6 directive may not be implemented because it has not received the preclearance required under section 5 of the Voting Rights Act and, in any event, because it conflicts with this Court's said orders of December 24 and January 10, which said orders apply to the 1992 Texas Senate (and House) elections, both general and primary;

2. The state defendants, and Slagle and Meyer, and any and all persons acting in concert with any of them, are hereby enjoined from implementing or complying with said August 6 directive, and ordered to set aside any action heretofore taken under or pursuant thereto; and,

3. That the state defendants, and Slagle and Meyer, are hereby ordered to carry out the 1992 Texas Senate general elections according to and utilizing the

12 Obviously, it did not refer to S.B. 1, which we rejected.

senate districts established in this Court's said December 24 and January 10 orders.

IT IS FURTHER ORDERED that the injunction provided for in paragraphs 2 and 3 above shall be effective upon the filing by plaintiffs of a bond in the amount of $500.00.

SIGNED this the 21st day of August 1992.

s/s
Will Garwood
United States Circuit Judge

s/s
Harry Lee Hudspeth
United States District Judge

s/s
Walter S. Smith, Jr.
United States District Judge

SUPREME COURT OF THE UNITED STATES

BOB SLAGLE, CHAIRMAN, TEXAS DEMOCRATIC PARTY *v.* LOUIS TERRAZAS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 91–1546. Decided October 5, 1992

The judgment is affirmed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Report of the Special Committee of the Fifth Circuit Judicial Council demonstrated that neither corruption nor improper motive affected the District Court's determination of the boundaries of Senate Districts 19 and 26. Nevertheless, the procedures that were followed in drawing the boundaries of those districts as established in the order under review represented such a serious departure from procedures that should be observed in fashioning relief in adversary litigation that I would vacate the judgment of the District Court with instructions to redraw the boundaries of those two Senate Districts after the parties have been given an adequate opportunity to be heard on issues that relate to those two districts.